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United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM BLACKWELL,

Plaintiff in Error,

vs.

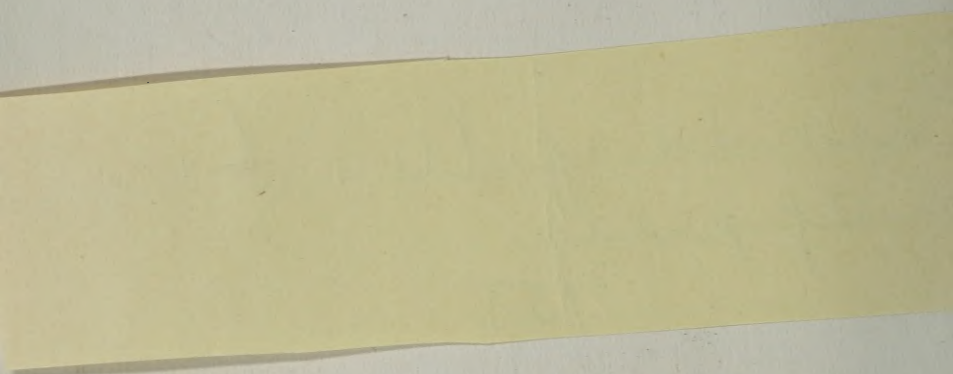
THE SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

FILED
FEB 19 1912

Rounds of U.S. Circuit Court
of appeals
755



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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

Messrs. THOMAS, BEEDY & LANAGAN, Attorneys for Plaintiff in Error,

Alaska Commercial Building, San Francisco, California.

C. W. DURBROW, Esq., Attorney for Defendant in Error,

Flood Building, San Francisco, California.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2103.

WILLIAM BLACKWELL,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

Stipulation (Under Rule 23).

WHEREAS, the above-named plaintiff in error has filed with the clerk of the above-named court the record of the above-entitled action, and has docketed said cause with said clerk; and

WHEREAS, said plaintiff in error has duly filed his assignment of errors, and hereby specifies and designates the following as the errors upon which he intends to rely on the hearing of said cause, namely:

That the facts found are insufficient to support the judgment in the said action in the following particulars:

I. .

The Court found that the actual loss of the assignor of plaintiff and of the plaintiff was \$5,694.76, and the judgment was for \$1,760.70 only.

II.

The Court found that the actual value of the goods shipped was \$5,694.76, and that such goods were delivered to the consignee thereof in bad order and condition, due to the negligence of the defendant, and that on account of such bad order and condition, the actual loss was the actual value; yet the judgment was for \$1,760.70 only.

III.

The Court found that at the time of the delivery to the defendant, or its connecting carrier, of the whiskey and spirits described in the complaint, an Internal Revenue Tax of \$1.10 per gallon, imposed by public statute had been paid thereon; yet the judgment was for \$1,760.70 only, that is to say, 50 cents per gallon.

IV.

The Court found that the consignor of the goods and the initial common carrier thereof agreed, at the time of the various shipments set forth in the complaint, that the whiskey and spirits shipped were of a "value limited to 50 cents per gallon," but found that the agent of the initial carrier knew, at the time of such shipments, that the value was greater than 50 cents per gallon; yet, in spite of the illegality of such agreement, the judgment was for \$1,760.70 only, in lieu of the real value of \$5,694.76.

V.

The Court found that the various published tariffs issued by the defendant and other connecting common carriers by rail covering the shipments involved in the above-entitled action, compelled the consignors of the whiskey and spirits shipped to limit the risk of such carriers to 50 cents per gallon or pay an additional freight rate of 20%; yet, in spite of the illegality of such published tariffs, the judgment was for \$1,760.70 only, when in fact the actual loss was \$5,694.76, as found.

VI.

The Court found that the assignor of the plaintiff delivered annually to the defendant its written agreement, by which it released the defendant and its connecting carriers in advance from any liability for goods lost or damaged above the valuations arbitrarily fixed in their published tariffs; yet, in spite of the illegality of such agreement, the judgment was for \$1,760.70 only, in lieu of the real value of \$5,694.76.

NOW, THEREFORE, it is hereby stipulated and agreed by and between the parties that the following parts of the record and no other shall be printed by the clerk, namely:

First. Complaint and Exhibit "A" attached thereto, appearing in said record at Page 1.

Second. The answer appearing in said record at page 9.

Third. Stipulation waiving jury, appearing in said record at Page 14.

Fourth. Findings of fact and conclusions of law,

appearing in said record at Page 22.

Fifth. Judgment, appearing in said record at Page 30.

Sixth. Certificate to judgment-roll, appearing in said record at page 32.

Seventh. Petition for writ of error, appearing in said record at Page 45.

Eighth. Assignment of errors, appearing in said record at Page 46.

Ninth. Order allowing writ of error, appearing in said record at Page 49.

Tenth. Bond on writ of error, appearing in said record at Page 50.

Eleventh. Clerk's certificate to record on writ of error, appearing in said record at Page 52.

Twelfth. Writ of error, appearing in said record at Page 53.

Thirteenth. Citation on writ of error, appearing in said record at Page 54.

Fourteenth. This stipulation.

IT IS FURTHER STIPULATED that the title of the court and cause in full on said papers shall be omitted, except on the first page, and that there may be inserted in place and stead thereof the words, "title of court and cause."

Dated this 9th day of January, A. D. 1912.

THOMAS, BEEDY & LANAGAN,

Attorneys for Plaintiff in Error.

G. B. SHOUP and

C. W. DURBROW,

Attorneys for Defendant in Error.

[Endorsed]: No. 2103. Circuit Court of Appeals of the United States, Ninth Circuit, Northern District of California. William Blackwell, Plaintiff in Error, vs. Southern Pacific Company, Defendant in Error. Stipulation (Under Rule 23). Filed Jan. 11, 1912. F. D. Monckton, Clerk.

*In the Circuit Court of the United States in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

WILLIAM BLACKWELL,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That he was at all the times hereinafter mentioned and still is a citizen of the State of California.

II.

That at all the times hereinafter mentioned the Crown Distilleries Company was, and still is, a corporation duly organized and existing under the laws of the State of California and a citizen of that State; and that at all the times hereinafter mentioned the said defendant was, and still is, a corporation duly organized and existing under the laws of the State of Kentucky, and a citizen of that State.

III.

That at all the times hereinafter mentioned the

said defendant was, and still is, a common carrier of goods by rail, with western termini in San Francisco, Sacramento, and Oakland, in the State of California, and with several eastern termini at points in the United States east of said City and County of San Francisco.

IV.

That at various dates during the three years last past [1*] and prior to the filing of the complaint in this action the defendant received in the course of its business, as such common carrier, at one of its eastern termini, certain goods, to wit, whiskey and spirits, a particular description of which, and the dates of shipment thereof, being fully set forth in Exhibit "A" attached hereto and made a part of this complaint.

V.

That upon the receipt of such goods the said defendant, as such common carrier, agreed for a valuable consideration to transport the same over its railroad lines and deliver the same in good order and condition to the said Crown Distilleries Company, at San Francisco, Oakland and Sacramento, as specified in said Exhibit "A"; that the said goods were not delivered to the said Crown Distilleries Company in good order and condition, but in bad order and condition, which said bad order and condition was due to the negligence and neglect of duty of the defendant, its servants, agents and employees.

VI.

That by reason of such negligence and neglect of

*Page-number appearing at foot of page of original certified Record.

duty and by reason of the fact that the said goods were not delivered in good order and condition, as agreed, the said Crown Distilleries Company suffered loss and was damaged on each shipment in the amounts specified in detail in said Exhibit "A," and that the total loss and damage of the said Crown Distilleries Company was and is Five Thousand Six Hundred Ninety-four and 76/100 (5,694.76) Dollars.

VII.

That the said Crown Distilleries Company has demanded of defendant the repayment to it of the amount of said damage and loss, but that the defendant has refused and still refuses to pay the same.
[2]

VIII.

That prior to the commencement of this action the said Crown Distilleries Company duly assigned its claims against the defendant, as set forth in said Exhibit "A," and that the said plaintiff is now the owner and holder of said claims.

WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of Five Thousand Six Hundred Ninety-four and 76/100 (5,694.76) Dollars, interest and costs.

THOMAS, GERSTLE, FRICK & BEEDY,

Attorneys for Plaintiff. [3]

Exhibit "A" [to Complaint].

80 Bbls. Whiskey shipped on or about Sept. 10/05 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 Bbl. with Stave broken and leakage resulting therefrom.

Loss of contents 15.71 Gals. Value.. \$40.85

60 Bbls. Spirits shipped on or about Jan. 4/07 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with 3 Bbls. Staves broken and balance leaking.

Loss of contents 104.68 Gals. Value.. 135.03

70 Bbls. Spirits shipped on or about March 8/07 from Peoria, Ill., to Sacramento, Cal., in carload shipment resulting delivered with cooperage damaged and leakage therefrom.

Loss of contents 56.38 Gals. Value.. 75.45

60 Bbls. Spirits shipped on or about Sept. 18/06 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom—on or about Nov. 13/06.

Loss of Contents 117.86 Gals. Value. 157.56

60 Bbls. Spirits shipped on or about May 29/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 169 Gals. Value... 230.04

60 Bbls. Spirits shipped on or about March

22/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 131.65 Gals. Value. 169.80

60 Bbls. Spirits shipped on or about March 1/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 26.55 Gals. Value.. 34.25

60 Bbls. Spirits shipped on or about April 18/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged and part of contents pilfered and part of balance leaking.

Loss of contents 49.20 Gals. Value.. 64.95

100 Bbls. Whiskey shipped on or about April 30/07 from Lynchburg, Ohio, to San Francisco, Cal, in carload shipment delivered with 1 Bbl. plugged and part of contents pilfered and 1 Bbl. leaking.

Loss of contents 16.79 Gals. Value.. 43.65

60 Bbls. Spirits shipped on or about April 4/07 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 75.89 Gals. Value.. 97.90

100 Bbls. Whiskey shipped on or about May 6/07 from Philadelphia, Pa., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 43.85 Gals. Value.. 113.10

77 Bbls. Whiskey shipped on or about Apr. 18/07 from Alton, Ky., to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged and part contents pilfered part balance cooperage damaged and leakage therefrom.

Loss of contents 31.80 Gals. Value.. 81.09

60 Bbls. Spirits shipped on or about May 7/07 from Peoria, Ill., to San Francisco, Cal., on carload shipment delivered with 1 Bbl. plugged and contents pilfered part balance cooperage damaged and leakage therefrom.

Loss of Contents 89.16 Gals. Value.. 120.35

60 Bbls. Spirits shipped on or about April 27/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 152.62 Gals. Value.. 206.10

100 Bbls. Whiskey shipped on or about April 30/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 43.65 Gals. Value.. 104.76

100 Bbls. Whiskey shipped on or about May 20/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged cooperage damaged and leakage resulting therefrom.

Loss of contents 38.74 Gals. Value.. 110.40

60 Bbls. Spirits shipped on or about May 2/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged plugged and leakage or pilferage resulting therefrom.

Loss of contents 158.58 Gals. Value.. 218.58

60 Bbls. Spirits shipped on or about July 16/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 2 Bbls. Short (pilfered in transit) and part of balance with cooperage damaged and leakage resulting therefrom.

Loss of contents 236.02 Gals. Value.. 311.55

60 Bbls. Spirits shipped in or about June 15/07 from Peoria, Ill., to Oakland, Cal., in carload shipment, delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 174.32 Gals. Value.. 228.78

60 Bbls. Spirits shipped on or about June 7/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leak-

age resulting therefrom.

Loss of contents 94.29 gallons. Value. 123.52

[5]

- 60 Bbls. Spirits shipped on or about June 29/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage plugged and damaged, with leakage or pilferage resulting therefrom.

Loss of contents 174.37 gallons. Value 228.42

- 60 Barrels spirits shipped on or about Aug. 22/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 60.93 gallons. Value. 82.80

- 60 Barrels Spirits shipped on or about June 4/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage broken and damaged, and leakage resulting therefrom.

Loss of contents 224.32 gallons. Value 296.60

- 40 Barrels and 20 half-barrels Whiskey shipped on or about Dec. 20/07 from Cincinnati to San Francisco, Cal., in carload shipment delivered with one-half-barrel short, pilfered in transit.

Loss of contents 30.80 gallons. Value. 98.56

- 60 Barrels spirits shipped on or about Nov. 1/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 3 barrels empty, contents pilfered;

balance cooperage damaged and leakage resulting therefrom.

Loss of contents 317.34 gallons. Value 428.40

100 Barrels Whiskey shipped on or about Nov. 21/07 from Alton, Kentucky, to San Francisco, Cal., in carload shipment delivered with one barrel short, pilfered in transit, 2 barrels heads gone, contents pilfered, part of balance load cooperage plugged and damaged, contents lost through pilferage and leakage.

Loss of contents 166.21 gallons. Value 565.10

100 Barrels Whiskey shipped on or about April 22/08 from Lawrenceburg, Ind., to San Francisco, Cal., in carload shipment delivered with 1 Barrel-head broken out, empty; 1 barrel plugged, part contents gone, pilfered, part balance of load cooperage damages with leakage resulting therefrom.

Loss of contents 90.17 gallons. Value 261.50

60 Barrels Spirits shipped on or about Nov. 30/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 107.03 gallons. Value 144.50

100 Barrels Whiskey shipped on or about May 22/08 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 barrel short, and 7 bbls. broken and nearly empty. Bal-

ance cooperage damaged and leakage resulting therefrom.

Loss of contents 146.21 gallons. Value 180.62

[6]

60 Barrels Spirits shipped on or about Feb. 14/08 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 200.25 gallons. Value 270.35

100 Barrels Whiskey shipped on or about Dec. 11/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 barrel broached and empty; 1 barrel plugged, part contents gone, pilfered.

Loss of contents 68.92 gallons. Value. 213.65

71 Barrels Whiskey shipped on or about July 2/08 from Henderson, Ky., to San Francisco, Cal., in carload shipment delivered cooperage damaged and leakage resulting therefrom.

Loss of contents 49.42 gallons. Value. 108.70

60 Barrels Spirits shipped on or about Aug. 18/08 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 41.28 gallons. Value. 57.80

43 Barrels Whiskey shipped on or about Sept. 26/06 from Baltimore, Md., to San Francisco, Cal., in L/C/L shipment re-

ceived with cooperage damaged and leakage resulting therefrom.

Loss of contents 31.05 gallons. Value. 90.05

[7]

State of California,

City and County of San Francisco,—ss.

William Blackwell, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

WM. BLACKWELL.

Subscribed and sworn to before me this 25th day of November, A. D. 1908.

[Seal]

CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 27, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [8]

[Title of Court and Cause.]

Answer.

Defendant, for answer herein:

Upon the ground that it has not sufficient information or belief upon the subject to enable it to answer, denies that it at all received, in the course of its business as a common carrier or otherwise, at any of its termini or any other place, any whisky or spirits

specified in Exhibit "A" referred to in Paragraph IV of plaintiff's complaint, or that it received any such shipments on the dates specified in said exhibit, or otherwise or at all.

Upon the same ground, denies that upon the receipt of said goods by defendant as a common carrier or otherwise, it at all agreed, for a valuable or any consideration, or otherwise, to transport said goods over any of its railroad lines, or to deliver the same in good order or condition to said Crown Distilleries Company at San Francisco, Oakland or Sacramento, as specified in said Exhibit "A," or at any other place or at all; or that said goods were not delivered to said Crown Distilleries Company in good order or condition, or that said goods were in bad order or condition, or that said alleged bad order and condition was at all due to any negligence or neglect of duty of defendant or of its servants, agents or employees. [9]

Defendant denies that by reason of said alleged negligence or neglect of duty, or by reason of the fact that said goods were not delivered in good order and condition as agreed, or by any other reason or at all, said Crown Distilleries Company suffered any loss, or was at all damaged, on any shipment in any amount, as specified in said Exhibit "A," or otherwise or at all, or that the total loss or damage of said Crown Distilleries Company at all was or is \$5,694.-76, or any other sum or at all.

Upon the ground that it has not sufficient information or belief upon the subject to enable it to answer, defendant denies that said Crown Distilleries Com-

pany at all assigned any claim against defendant, as set forth in said Exhibit "A" or otherwise, or that said plaintiff is not now the owner or holder thereof.

For a further and separate answer, defendant alleges, on its information and belief, that the shipments specified in Exhibit "A" attached to plaintiff's complaint were received by defendant and its connections, as common carriers, at the points specified in said exhibit, for carriage to the points therein specified, upon and subject to the terms, provisions and conditions of certain written contracts for said carriage, accepted and signed by the consignor of said shipments, wherein and whereby and by the express terms and conditions whereof, and by the express terms, provisions and conditions of the tariffs and classifications in effect at the time of said shipments, and in consideration of the special rates of freight or hire therein mentioned, and of the apportionment of said rates of freight or hire to the value of the property to be carried, it was specially agreed by and between said consignors and defendant and its connections that the value of said shipments should be deemed to be, for all the purposes of said contract, [10] the just and full sum of 50 cents per gallon, and said value was therein and thereby declared to be said sum of 50 cents per gallon.

It was further expressly provided in said tariffs and classifications, and in and by said written contracts and the express terms, provisions and conditions thereof, for the considerations aforesaid, that in case any loss or damage should be sustained, for which said defendant or its connections should be

liable, the amount to be claimed by said consignors or their assigns, for said liquors so lost or damaged should be adjusted on the basis of the value at the time and place of shipment, not exceeding the declared value as in said tariffs and classifications provided and in said written contracts set forth, and on which declared value and rate of transportation therein named said shipments were based; and in no event should defendant or its connecting carriers be liable for any loss of said shipments, or any damage thereto, in excess of said agreed and declared valuation; and that in no event should there be any recovery from defendant or its connections for any loss of or damage to said shipments, from whatever cause arising, in excess of said declared or agreed value.

That at the time of delivering said shipments to defendant and its connections, and of accepting and signing said written contracts, said consignors had knowledge of and accepted said contracts with knowledge of the terms, provisions and conditions thereof and of the tariffs and classifications in force at said times, and defendant and its connections had no knowledge of the true value of said shipments or any or either of them, or of the value of any or either of said shipments other than said declared value, and said rates of freight or hire for [11] the carriage of said shipments from the points specified in said Exhibit "A" to said destinations specified therein were fixed by defendant and its connections with reference to said declared and agreed values, and defendant and its connections thereby determined the said rates of freight or hire for transporting said

shipments between said specified points. And defendant avers that the regular rate of freight or hire for transporting said shipments between said specified points would have been higher if no valuation of said shipments had been declared by or agreed to by said consignors or shippers by said contracts of carriage, or if a higher valuation than 50 cents per gallon had been declared by said shippers or consignors.

WHEREFORE said defendant prays for judgment and for its costs herein incurred.

C. W. DURBROW.

Attorney for Defendant.

State of California,

City and County of San Francisco,—ss.

E. E. Calvin, being duly sworn, deposes and says: That he is the Vice-president and General Manager of Southern Pacific Company, defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

E. E. CALVIN.

Subscribed and sworn to before me this 17th day of December, 1908.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [12]

Service of the within Answer is admitted this 17th day of December, 1908.

THOMAS, GERSTLE, FRICK & BEEDY,

Attorneys for Plaintiff.

[Endorsed]: Filed December 18, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

[Title of Court and Cause.]

Stipulation Waiving Jury.

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that said action may be tried by the Court sitting without a jury, and the said parties hereby waive their right to have said action submitted to and the issues determined by a jury.

THOMAS, GERSTLE, FRICK & BEEDY,
Attorneys for Plaintiff.
C. W. DURBROW,
Attorney for Defendant.

[Endorsed]: Filed March 15, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [14]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The above-entitled action came on regularly to be heard before the above-entitled court, a jury having been waived, on November 23d, 1909, Messrs. Thomas, Gerstle, Frick & Beedy, appearing for the plaintiff, and C. W. Durbrow, Esq., appearing for the defendant, and from the evidence introduced at such trial, the Court now finds the following facts:

I.

That prior to the commencement of the action, the Crown Distilleries Company, a California corporation, duly assigned the claim set forth in the complaint, to the plaintiff, who was, at the time of the commencement of such action, and still is, the owner and holder of such claim.

II.

That at all the times described in the complaint, the defendant was a common carrier of goods by rail, with western termini in San Francisco, Sacramento and Oakland, in the State of California, and with several eastern termini, at points in the United States east of said California; and that in the course of its business as a common carrier, such defendant received, on various occasions between September 10th, 1905, and [22] August 18th, 1908, at one of its eastern termini, in good order and condition, certain whiskey and spirits, described in the complaint herein, of the actual value of Five Thousand Six Hundred Ninety-four and 76/100 Dollars (\$5,694.76), and that said defendant undertook to deliver said goods in good order and condition to the Crown Distilleries Company, at San Francisco, Oakland or Sacramento.

III.

That such goods were not delivered by the defendant to the Crown Distilleries Company in good order and condition, but that such goods, when delivered, were in bad order and condition.

IV.

That said Crown Distilleries Company, by reason

of the fact that such goods were not delivered in good order and condition, as agreed, suffered an actual loss of Five Thousand Six Hundred Ninety-four and 76/100 Dollars (\$5,694.76).

V.

That at the time of the delivery to the defendant, or to some common carrier connecting with its eastern termini, of the whiskey and spirits in question, and prior thereto, there had been imposed upon such whiskey and spirits an internal revenue tax of one and 10/100 dollars (\$1.10) per gallon, and that said amount of tax formed a portion of the real value of said whiskey and spirits, in addition to the valuation of fifty (50) cents per gallon specified in the bills of lading issued at the time of the various shipments referred to in said complaint; that said tax had been imposed and was existing by virtue of the Public Statutes of the Government of the United States, regularly enacted, which said Statutes were in full [23] force and effect and were a matter of public record at the dates of all of the shipments described in the complaint, and that such whiskey and spirits were delivered to the defendant, or its connecting carrier, after all such taxes so imposed had been duly and fully paid.

VI.

That during the years of such shipments, the Crown Distilleries Company annually executed and delivered to the defendant an instrument, in the words and figures following:

“SOUTHERN PACIFIC COMPANY—SEASON
FREIGHT RELEASE.

SAN FRANCISCO STATION.

THE FOLLOWING APPLIES TO AND COVERS ALL GOODS, WARES, AND MERCHANDISE DELIVERED AT ANY TIME FROM DATE HEREON DURING THE CURRENT YEAR.

WHEREAS, the undersigned ship and receive goods, wares and Merchandise over the lines of the Southern Pacific Company, and from its connecting Transportation Companies at above Station to and from divers parties at divers stations on said lines;

AND WHEREAS, said Company and its connections propose to transport such goods, wares and merchandise at rates which are less than charged for the same classes of freight shipped under the Carrier's legal responsibility, in consideration of the undersigned releasing the Carriers as hereinafter set forth;

AND WHEREAS, the Western classification, in connection with the Tariffs of the Southern Pacific Company, often provides lower rates for shipments conditioned on an agreed valuation;

AND WHEREAS, the undersigned desire to secure the benefit of such special rates, and to avoid the trouble and inconvenience of executing a separate contract for each shipment;

NOW, THEREFORE, in consideration of these premises I or we do hereby release the SOUTHERN PACIFIC COMPANY, and each and every other Transportation Company over whose lines said goods may pass, from any and all liability for dam-

age by leakage, shifting, chafing or breakage on any and all shipments, whenever the Tariff provides a lower rate for transporting at owner's risk; or for breakage of any property packed in boxes, barrels, crates, or bales when such packages have not been roughly handled or for breakage, chafing, wet, rust, or any other injury resulting from the fragile nature of the freight, imperfect or insecure packing, bad or insufficient cooperage, or shipping without packing, or from the decay of perishable articles, or from damages arising from the effects of heat or cold; or damages by stains to packages, by sweating or fermentation, or damages to freight by reason of its own inherent vice, [24] or liability, and from all loss and damage by any cause whatsoever not resulting from the gross negligence of one or another of said Transportation Companies, on all goods, wares and merchandise which may be SHIPPED or RECEIVED by us at released rates on any or either of the lines of the said Southern Pacific Company or connecting companies.

And do further release said SOUTHERN PACIFIC COMPANY and each and every Company over whose line or lines said freight may have been or will be transported to destination, from all liability for loss or injury when lower rate is applied conditioned on a limited valuation while on any or either of the lines of said Company or Companies.

CROWN DISTILLERIES CO.

LOUIS S. HAAS,

Secretary."

D. S. MURRAY, Witness.

VII.

That each of the bills of lading issued by the defendant, or its connecting carrier, upon the receipt of the various shipments described in the complaint, had upon its face, inserted by the carrier, the words: "Valuation 50 cents per gallon; owners' risk leakage"; or the words: "Value limited to 50 cents per gallon; O. R. L."; and that the letters "O. R. L." mean: "Owners' risk of leakage." And that the rates paid by the shipper upon each of said shipments were based upon such limited valuation.

VIII.

That the various public tariffs issued by the defendant, and other common carriers by rail, covering the shipments involved in this action, were in the words and figures following, to wit:

"SPIRITS IN WOOD. WHISKEY IN WOOD.

Min. C/L Wgt.

Min. C/L Wgt.

24,000 lbs.

24,000 lbs.

"Carriers' risk limited to 50¢ per proof

gallon, and so receipted for.....\$.85 \$1.25

Carriers' risk not so limited..... 1.02 1.50

The present westbound tariff has at different times carried various rules relating to released valuation as follows:

(A) Effective January 18, 1904,—Rule 16. Where articles are provided for released to given valuations, the release given by shipper should clearly state the limitation of valuation. When this requirement is omitted, shipments will be subject to an additional charge of 20%. [25]

(B) Effective January 10, 1908—Rule 16 (as

amended): When a rate named in this tariff is fixed by limitation of value, shipper MUST endorse shipping order or bill of lading 'RELEASED TO VALUATION REQUIRED UNDER THIS TARIFF.' When such notation is omitted, a charge of 20% additional to rates named herein will be made. This will not apply when actual value does not exceed the valuation named in this tariff.

(C) Effective February 10, 1908—Rule 16 (as amended): When a rate named in this tariff is fixed by limitation of value, shipper must endorse on shipping order or bill of lading 'RELEASED TO ——— VALUATION AS REQUIRED UNDER THIS TARIFF.' When such notation is omitted, a charge of 20% additional to rates named herein will be made. This will not apply, however, when actual value does not exceed the valuation named in tariff, nor on commodities for which through specific rates are named on different valuations.

(D) Effective March 17, 1908—Rule 16 (as amended): When rate named in this tariff on any article is conditioned upon a limited valuation, as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such indorsement:

'THE AGREED VALUE OF THIS SHIPMENT IS \$———.

_____,
Shipper.'

When such notation is omitted, a charge of 20% additional to rates named herein on such articles will be made. This will not apply, however, when

actual value does not exceed the valuation named in tariff.

(E) Effective April 17, 1908—Current—Rule 16 (as amended): When rate named in this tariff on any article is conditioned upon a limited valuation as specified in this tariff, shipper must indorse on shipping order or bill of lading in terms set forth in this tariff and sign such indorsement as follows:

‘THE AGREED VALUE OF THIS SHIPMENT
IS \$———.

_____,
Shipper.’

When such notation is omitted, a charge of twenty per cent (20%) additional to rates named herein on such articles will be made.

The terms set forth in the current West-Bound Tariff with respect to limitation of carriers’ liability for shipments of Spirits and Whiskey read as follows:

‘Owners risk of evaporation, outage or leakage, carriers’ risk to be limited to 50 cents per proof gallon and so receipted for.’ (Words ‘owners risk of evaporation, outage or leakage’ were eliminated from the tariff by Supplement 59 thereto, effective January 10, 1908.” [26]

IX.

That the bad order and condition in which the whiskey and spirits were delivered to the Crown Distilleries Company was due to the negligence of the defendant.

X.

That the agent of the initial carrier who shipped

the various bills of lading knew, at the time of such issue, that the whiskey and spirits described in such bills of lading were of greater value than fifty (50) cents a gallon.

And as a conclusion of law from the foregoing facts, the Court finds that the plaintiff and his assignor are bound by the valuation of fifty (50) cents per gallon, and that, therefore, the plaintiff is entitled to recover the sum of One Thousand Seven Hundred Sixty and 70/100 Dollars (\$1,760.70), and no more.

Let judgment be entered accordingly.

WM. C. VAN FLEET,

Judge.

Dated November 14th, 1911.

[Endorsed]: Filed Nov. 15, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [27]

[Title of Court and Cause.]

Judgment on Findings.

This cause having come on regularly for trial upon the 23d day of November, 1909, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties, William Thomas, Esq., appearing as attorney for the plaintiff and C. W. Durbrow, Esq., appearing as attorney for the defendant, and evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys, having been submitted to the Court for consideration and decision, and the

Court, after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law by reason of the findings aforesaid, it is considered by the Court that William Blackwell, plaintiff, do have and recover of and from Southern Pacific Company, defendant, the sum of One Thousand Seven Hundred Sixty and 70/100 (\$1,706.70) Dollars, together with his costs herein expended taxed at \$——.

Judgment entered December 12, 1911.

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,
Deputy Clerk.

A True Copy. Attest:

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,
Deputy Clerk. [30]

[Endorsed]: Filed Dec. 12, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [31]

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court
this 12th day of December, 1911.

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed December 12, 1911. Southard
Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[32]

[Title of Court and Cause.]

Petition for Writ of Error.

Now comes William Blackwell, the plaintiff
herein, and says that on the 12th day of December,
1911, this Court entered judgment herein, in favor
of the said plaintiff and against the said defendant,
in which judgment and the proceedings had prior
thereunto in this cause certain errors were com-
mitted to the prejudice of this plaintiff, all of which
will more in detail appear from the Assignment of
Errors which is filed with this petition;

WHEREFORE, plaintiff prays that a Writ of
Error may issue in this behalf, out of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, for the correction of the errors so complained
of, and that a transcript of the record, proceedings
and papers in said cause, duly authenticated, may
be sent to the clerk of said Court of Appeals.

THOMAS, FRICK & BEEDY,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [45]

[Title of Court and Cause.]

Assignment of Errors.

The plaintiff in the above-entitled action, in connection with this petition for a writ of error, assigns the following errors in the decision of the Circuit Court upon which he will rely in the prosecution of such writ of error:

That the facts found are insufficient to support the judgment in the said action in the following particulars:

I.

The Court found that the actual loss of the assignor of plaintiff and of the plaintiff was \$5,694.76, and the judgment was for \$1,760.70 only.

II.

The Court found that the actual value of the goods shipped was \$5,694.76, and that such goods were delivered to the consignee thereof in bad order and condition, due to the negligence of the defendant, and that on account of such bad order and condition, the actual loss was the actual value; yet the judgment was for \$1,760.70 only. [46]

III.

The Court found that at the time of the delivery to the defendants, or its connecting carrier, of the whiskey and spirits described in the complaint, an Internal Revenue Tax of \$1.10 per gallon, imposed by public statute had been paid thereon; yet the

judgment was for \$1,760.70 only, that is to say, 50 cents per gallon.

IV.

The Court found that the consignor of the goods and the initial common carrier thereof agreed, at the time of the various shipments set forth in the complaint, that the whiskey and spirits shipped were of a "value limited to 50 cents per gallon," but found that the agent of the initial carrier knew, at the time of such shipments, that the value was greater than 50 cents per gallon; yet, in spite of the illegality of such agreement, the judgment was for \$1,760.70 only, in lieu of the real value of \$5,694.76.

V.

The Court found that the various published tariffs issued by the defendant and other connecting common carriers by rail covering the shipments involved in the above-entitled action, compelled the consignors of the whiskey and spirits shipped to limit the risk of such carriers to 50 cents per gallon or pay an additional freight rate of 20%; yet, in spite of the illegality of such published tariffs, the judgment was for \$1,760.70 only, when in fact, the actual loss was \$5,694.76, as found.

VI.

The Court found that the assignor of the plaintiff [47] delivered annually to the defendant its written agreement, by which it released the defendant and its connecting carriers in advance from any liability for goods lost or damages above the valuations arbitrarily fixed in their published tariffs; yet, in spite of the illegality of such agreement, the judg-

ment was for \$1,760.70 only, in lieu of the real value of \$5,694.76.

WHEREFORE, plaintiff prays that the judgment of said Circuit Court be reversed.

THOMAS, FRICK & BEEDY,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [48]

[Title of Court and Cause.]

Order Allowing Writ of Error.

This 21st day of December, 1911, came the plaintiff, William Blackwell, by his attorneys, Messrs. Thomas, Beedy & Lanagan, and filed herein and presented to the Court his petition praying for the allowance of a Writ of Error and Assignment of Errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises,

In consideration whereof, the Court does allow the Writ of Error, upon the plaintiff giving a bond in the sum of Five Hundred (\$500.00) Dollars, which shall operate as a supersedeas bond.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [49]

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, William Blackwell, as principal, and E. R. Lilienthal and Joseph Sloss, as sureties, are held and firmly bound unto the defendant, Southern Pacific Company, in the full and just sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, to be paid to the said defendant, Southern Pacific Company, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our executors, administrators and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this 21st day of December, A. D. 1911.

WHEREAS, on the 12th day of December, 1911, in the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, in a suit pending in said court between the said William Blackwell as plaintiff and the said Southern Pacific Company as defendant, a judgment was rendered in favor of the said plaintiff and against the said defendant, and

WHEREAS, the said William Blackwell, plaintiff, has obtained an order from said Court, allowing a writ of error to reverse [50] said judgment in the aforesaid suit:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said above-named principal, William Blackwell, shall prosecute said writ of error to effect and answer all damages

and costs if he fails to make said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seals, the day and year first above written.

W. BLACKWELL, [Seal]

Principal.

E. R. LILIENTHAL. [Seal]

JAS. SLOSS, [Seal]

Sureties.

State of California,

City and County of San Francisco,—ss.

E. R. Lilienthal and Jas. Sloss, being each duly and severally sworn, deposes and says: That he is a resident and householder within the Northern District of California, and is worth the amount specified in the above bond over and above all his debts and liabilities, exclusive of property exempt from execution.

E. R. LILIENTHAL.

JAS. SLOSS.

Subscribed and sworn to before me this 21st day of December, 1911.

[Seal]

M. V. COLLINS,

Notary Public, in and for the City and County of San Francisco, State of California.

Approved this 21st day of December, 1911.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[51]

[Title of Court and Cause.]

**Certificate of Clerk U. S. District Court to Record on
Writ of Error.**

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing fifty-one (51) pages, numbered from 1 to 51, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$30.60; that said amount was paid by Messrs. Thomas, Beedy & Lanagan, attorneys for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of January, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk of the District Court of the United States,
Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [52]

[Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between William Blackwell, plaintiff in error, and Southern Pacific Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said William Blackwell, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, the 3d day of January, in the year of our Lord One Thousand Nine Hundred and Twelve.

[Seal] JAS. P. BROWN,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge, Northern District of
California.

Service of within Writ and receipt of a copy thereof is hereby admitted this 4th day of Jan., 1912.

C. W. DURBROW,
Atty. for Defendant in Error.

The answer of the Judges of the District Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commended.

By the Court.

[Seal] JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 14,820. United States Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. Southern Pacific Co., Defendant in Error. Writ of Error. Filed Jan. 4, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Southern Pacific Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein William Blackwell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 3d day of January, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this 4th day of January, 1912.

C. W. DURBROW,
Attorneys for Deft. in Error.

[Endorsed]: No. 14,820. U. S. Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. Southern Pacific Co. Citation on Writ of Error. Filed Jan. 4, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2103. United States Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. The Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed January 6, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

2
No. 2103

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM BLACKWELL,
Plaintiff in Error,

VS.

SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

The case, as disclosed by the special findings, is as follows:

At the times described in the complaint, defendant, which was a common carrier of goods by rail, received at several of its Eastern termini, in good order and condition, certain whiskey and spirits, of the actual value of \$5,694.76, to be delivered by it to the Crown Distilleries Company, the assignor of the plaintiff, at some of the defendant's Western termini in California.

On account of the negligence of the defendants, the goods were delivered to the consignee in

bad order and condition, by reason of which the consignee suffered an actual loss of \$5,694.76.

The Crown Distilleries Company annually executed and delivered to the defendant a contract called "Season Freight Release", by which it released defendant from all liability, except gross negligence, on all goods forwarded to it on an agreed valuation and at special rates below published tariff, for such transportation (Transcript fols. 23-24).

There were various public tariffs issued by the defendant, covering the shipments involved in this action, providing that spirits in wood could be transported at 85 cents per proof gallon where the carrier's risk was limited to 50 cents per proof gallon and so receipted for, but where the carrier's risk was not so limited, the rate would be \$1.10 per proof gallon. In regard to whiskey in wood, the rates were fixed at \$1.25 per proof gallon, where the risk was limited to 50 cents and \$1.50 per gallon where the carrier's risk was not so limited.

During the period of shipments, Rule 16 of the West-Bound Tariff of the defendant was amended several times in regard to "Released Valuations". On January 18, 1904, Rule 16 provided that,

"Where articles are provided for released to given valuations, the release given by the shipper should clearly state the limitation of valuation. When this requirement is omitted, shipments will be subject to an additional charge of 20%".

On January 10, 1908, Rule 16 was amended so as to read:

“When a rate named in this tariff is fixed by limitation of value, shipper must endorse shipping order or bill of lading ‘*Released to Valuation Required Under this Tariff*’. When such notation is omitted a charge of 20% additional to rates named herein will be made.”

On February 10, 1908, Rule 16 was again amended so as to read:

“When a rate named in this tariff is fixed by limitation of value, shipper must endorse on shipping order or bill of lading ‘*Released to Valuation as Required Under this Tariff*’. When such notation is omitted, a charge of 20% additional to rates named herein will be made.”

Again on March 17, 1908, Rule 16 was again amended so as to read:

“When rate named in this tariff on any article is conditioned upon a limited valuation, as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such endorsement:

‘*The Agreed Value of this Shipment is \$.....*

.....
Shipper.’

When such notation is omitted, a charge of 20% additional to rate named on such articles will be made.”

On April 17, 1908, Rule 16 was again amended so as to read:

“When rate named in this tariff on any article is conditioned upon the limited valuation

as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such endorsements as follows:

'The Agreed Value of this Shipment is \$.....

Shipper.'

When such notation is omitted a charge of 20% additional to rates named herein on such articles will be made."

Each of the bills of lading issued by the defendant or its connecting carrier upon the receipt of the various shipments described in the complaint, had upon its face, inserted by the carrier, the words "Valuation 50 cents per gallon; owners' risk leakage"; or the words "Value limited to 50 cents per gallon; O. R. L.", the letters O. R. L. meaning "Owners' Risk of Leakage". The rates paid by the shipper upon each of said shipments were based upon such limited valuation.

At the time of each of these shipments there had been imposed upon the goods shipped, by public statute, an Internal Revenue tax of \$1.10 per gallon, which tax had been paid, and the amount of such tax formed a portion of the real value of the goods shipped, in addition to the valuation of 50 cents per gallon, specified in the bills of lading.

The agent of the initial carrier who shipped the goods and issued the bills of lading, knew, at the time of such issue, that the whiskey and spirits described therein were of greater value than 50 cents per gallon.

Specification of the Errors Relied Upon.

There are six specifications in the assignment of errors contained in the Transcript, folios 45, 46 and 47, but each of such specifications is to the same effect that it was error to render judgment for \$1760.70, that being the loss calculated at 50 cents per gallon, when the actual loss to the assignor of the plaintiff was in fact \$5694.76, for the reason that all arrangements between the Crown Distilleries Company and the defendant, and the consignors of the Crown Distilleries and the defendant, were illegal, and that the plaintiff, as the assignee of the Crown Distilleries Company, was entitled to recover the actual loss of his assignor.

We submit the above as our interpretation of the object of Rule 24 of this Court.

Points and Authorities on Behalf of the Plaintiff in Error.

There is some actual and a good deal of apparent conflict of authority on the sole question presented in this case. The learned nisi prius judge decided the case at bar on the authority of

Hart v. Pennsylvania Railroad Company,
112 U. S. 331, and

*Donlon Brothers v. Southern Pacific Com-
pany*, 151 Cal. 763.

(See Judge Van Fleet's opinion, 184 Fed.
Reporter 489.)

We maintain that the case can be clearly distinguished from those two authorities and that the same falls clearly within the class III-d, as described in the opinion of the Interstate Commerce Commission, rendered

In the Matter of Released Rates, XIII Interstate Commerce Reports, 550.

In dealing with rates conditioned upon the shipper's agreeing that the carrier's liability shall be limited to a certain specified value, the Interstate Commerce Commission says:

"III (d). If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped, in the event of loss due to negligence * * *. If the shipper and carrier collusively agree that, for the purpose of transportation, the property shall be deemed to have a specified value which both know to be grossly disproportionate to the true value, the agreement cannot be called bona fide. It may be styled an 'agreed valuation', but it is obviously an attempt to accomplish what the law forbids. The requirement that the carrier shall not limit, in any degree, its responsibility for negligence, is uncompromising and it will not yield merely because the parties choose to employ the phrase 'agreed valuation'. The law will not countenance so obvious a subterfuge."

(Page 556 of Opinion.)

The class under which we submit our case falls, is again defined on page 561 of the same opinion, as follows:

“The stipulation is void as against loss due to the carrier’s negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact fictitious and represents an attempt to limit the carrier’s liability to an arbitrary amount.”

In the Hart and Donlon cases, relied upon by the learned judge of the Circuit Court, there was no finding that the carrier, as well as the shipper, knew that the real valuation was in excess of the declared value. In neither of these cases, so relied upon, was the “released” value forced upon the shipper by the provisions of a tariff required to be published by law. On the contrary, in both cases the value was fixed at a sum, just and reasonable to the shipper, and the contract under discussion was expressly held, in both cases, to have been “fairly” entered into. In neither case did it appear that the real object and purpose of the agreed valuation was to limit the liability of the carrier against the consequences of its negligence, either in whole or in part. In the Hart case, Judge Blatchford says (pages 341-342):

“The plaintiff accepted the valuation as just and reasonable. The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.”

Judge Lorigan says, in the Donlon case (page 775):

“He (plaintiff) fixed the valuation on them himself; the defendant had nothing to do with it. * * * These special contracts provided for freight rates proportionate to the value of the horses shipped. ‘An increase of 10 per cent in the freight charges for a rise of 100 per cent in the value of the horses to be transported cannot be said to be an unreasonable charge.’ ”

How different are the contracts in these cases from that in the case at bar. Governed by the tests laid down in the above quotations, the contract relied upon as a defense in the case at bar, is not fair and reasonable. The general rule is laid down by Judge Redfield in his *American Railroad Cases* and adopted with approval by the Supreme Court of the United States in

N. Y. R. R. Co. v. Lockwood, 17 Wallace 357.

“That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances and, therefore, not binding.”

Judge Bradley’s reasons for the approval of this rule are striking. He says in the *Lockwood* case:

“The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier pre-

sents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected.”

The Court will note particularly that in both the Hart and Donlon cases a fair alternative was offered to the shipper. In the case at bar no such alternative was offered, nor could it have been specially offered in the case at bar as both parties were bound by a published tariff, provided for by the Interstate Commerce Act and neither shipper nor carrier could deviate from the rates so published without suffering severe penalties. The rate on spirits and whiskies did not pretend to be graduated according

to the value of the goods; the real value apparently cut no figure in the rate, which read:

“Carrier’s risk to be limited to 50 cents per proof gallon and so receipted for.”

The Court will note that the only alternative presented to the shipper was an additional rate of 20 per cent. If, in the case at bar, the whiskey and spirits were worth, in fact, 51 cents per proof gallon, the unlimited rate on spirits would have been \$1.02 in lieu of 85 cents and the rate on whiskey would have been \$1.50 in lieu of \$1.25.

The Interstate Commerce Commission flatly holds that such stipulation is unreasonable, saying (XIII Interstate Commerce Commission Reports, page 565):

“The stipulation that ‘shipments not made as above provided are subject to an additional charge of 20 per cent’ is unreasonable. A certain differential between rates which leave the carrier’s liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited. An increased charge of 20 per cent is manifestly out of all proportion to the larger risk involved and its virtual effect is to restrict the public from rates calling for unlimited liability, and herein lies the vice in stipulations of this character.”

The language used in Rule 16 of the Public Tariff (Trans. fols. 24 and 25) may be perfectly plain to an experienced railroad officer, but to the ordinary

shipper, the language is ambiguous. Whether the words "release" and "released" refer to the freight rate or to the valuation of the goods or to the liability of the common carrier, is impossible of determination. The Interstate Commerce Commission entitles its opinion as one "In the Matter of Released Rates." The West-bound Tariff of the defendant refers to "Released Valuation" (folio 24). The amendment of January 10, 1908, to Rule 16 provides for the endorsement on the bill of lading of "Released to Valuation Required under this Tariff". The amendment of April 17, 1908, reads, "conditioned upon a limited valuation" showing clearly that the carrier knows in advance that the "*limited*" valuation is not the *true* valuation.

The "Season Freight Release" contract, signed by the Crown Distilleries, carries out the idea that the primary purpose of this contract was not, as in the Donlon case, "to fix an agreed valuation * * * " as a basis upon which the freight rates should be "charged and paid" (page 796), but to limit the responsibility of the carrier without regard to the true value of the goods. The two last paragraphs of this contract bear out our contention that the object of the same was to limit the liability of the carrier rather than to make a rate proportionate to the value of the goods. It nowhere discloses an attempt on the part of either party to liquidate, in advance, the damages which the carrier would have to pay, based upon a bona fide valuation of the goods shipped. This general object to limit the liability of

the carrier is borne out by the published rates and Rule 16, for it was not until March 17, 1908, that the language used showed any agreement between the parties as to the value of the shipment.

The Court will note particularly that in the case at bar the plaintiff's assignor and its shippers did not have the opportunity, as in the Hart and Donlon cases, of stating in good faith a higher valuation and paying thereon a reasonable increase in freight. A mere increase of one-half of one per cent in valuation required an increased freight rate of twenty per cent without any alternative.

On one point decided in the Donlon case, there is an irreconcilable conflict of authority; that is the dictum of Judge Lorigan on page 775 that in determining whether the contract is fair and reasonable, the fact as to whether the agreed value reasonably approximated the real value cannot be taken into consideration. The case of

Hill v. Northern Pacific Railway Company,
(Wash.) 74 Pac. 1054,

supports Judge Lorigan's dictum. The weight of authority appears to be the other way, supporting the rule laid down by

Hutchinson on Carriers, Sec. 427,

which is as follows:

“And it may be stated as a better rule, that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and

the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligations of responding for their real value where his misconduct has occasioned their loss."

Also authorities cited by Commissioner Lane at the end of page 559 and at the commencement of page 560, and in

Murphy v. Wells Fargo & Company, (Minn.)
108 N. W. 1070,

in which case the valuation of 550 cases of strawberries was fixed at \$50.00, the freight paid was \$330.00 and the actual value of the shipment was \$2,000.00.

Since the decision in the Hart and Donlon cases there have been a number of cases involving the validity of contracts similar to those involved in the case at bar. In all of them the rule has been enforced,

1. That the agreement as to valuation must be a reasonable one;
2. That it must not be known to be a fiction by both carrier and shipper;
3. That the shipper had a fair and reasonable alternative presented to him; and
4. That the primary purpose of the contract must be to arrive at a bona fide valuation of the

goods shipped and not a mere arbitrary attempt to limit the liability of the carrier.

Hansen v. Great Northern Railroad, (N. D.)

121 N. W. 78;

A. T. & S. F. R. R. Co. v. Smythe, (Texas)

119 S. W. 892;

Louisville Railroad v. Warfield, (Georgia) 65

S. E. 308;

Southern Express Co. v. Hannan, (Georgia)

67 S. E. 945;

Central Georgia Railway Co. v. Buttu Marble Co., (Georgia) 68 S. E. 775;

Ostroot v. N. P. Railway Co., (Minn.) 127

N. W. 177;

Chicago and Rock Island R. R. Co. v. Wehrman, (Okl.) 105 Pacific 328;

Pierce Co. v. Wells Fargo & Co., 189 Fed. 561.

In the latter case, a majority of the Court held that the Hart case controlled the facts. There is a strong dissenting opinion by Noyes, Circuit Judge, who, while recognizing the authority of the Hart case, refuses to apply it to the facts involved in the case under discussion. In that case the bill of lading limited the liability of the company to \$50.00. The goods, consisting of a carload of automobiles, of the actual value of \$15,000, were fully described in writing, with the additional statement "value asked and not declared". It does not appear whether the shipper had any reasonable alternative offered

to him. Yet, one of the principal authorities distinguished in the majority opinion (*The Kensington*, 183 U. S. 263) holds void a contract limiting the liability for baggage on a transatlantic voyage to 250 francs, placing it expressly upon the ground that the limitation is arbitrary "unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment".

We respectfully submit that the learned Judge of the District Court was in error in feeling bound to follow the ruling of the Supreme Court of the State of California in the Donlon case. We submit that it is not the law of this Court that it must adopt the declared policy of the State in which it sits.

Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477,

cited by the learned nisi prius Judge, does not so decide. It simply holds that the decision of a State Court enforcing a State statute refusing to a carrier the right to limit its liability by special contract, is not subject to review by a Federal Court. Moreover, the policy of the State in which the decision was first rendered, was not under discussion, the contract in question having been executed in New York, the case coming to the Federal Courts from the State of Pennsylvania. We admit that it has been the policy of the Federal Courts to enforce or to refuse to interfere with the enforcement of the laws of the State in which the contract was entered into (as distinguished from the law of the State in which

the Federal Court sits), where Congress has not legislated on the subject, but, we respectfully submit that since the decisions in the Hart, Donlon and Hughes cases, Congress has legislated on the subject of special contracts limiting carriers' liability, by the adoption of the amendment of 1906 to the Interstate Commerce Act, reading as follows:

“That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.”

Under the above quoted statute, we submit that the “Season Freight Release” contract executed annually by the Crown Distilleries Company is void; that in contravention of this provision, it releases in advance all liability of the defendant, except for *gross* negligence, but, while the laws of the State of California recognize a distinction between ordinary and gross negligence, the Federal Courts have persistently refused to recognize any such difference.

Pierce v. Wells Fargo & Co., 189 Fed. 561;
Railway Co. v. Arms, 91 U. S. 489.

We further call attention to the fact that none of the shipments described in the complaint made after

January 10, 1908, conform to any of the provisions of Rule 16 of the West-Bound Tariff, as amended on that date, and at various times thereafter, all of such amendments requiring the endorsement by the shipper on the bill of lading of his assent to the released or agreed valuation.

Under the facts presented, the case at bar must be distinguished from the Hart, Donlon and Hughes cases, on the grounds above stated.

All of which is respectfully submitted.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BLACKWELL,

Plaintiff in Error,

VS.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

No. 2103.

Brief on Behalf of Defendant In Error.

By prefacing the argument which will be advanced in behalf of defendant in error by a brief statement of the facts, none of which are controverted, it is believed that the rules of law applicable to the sole question in controversy can be more easily applied.

The shipments in controversy were received in due course by the initial eastern carrier in good condition, and upon arrival at destination were found to have suffered damage, principally by leakage, while in the hands of some one of the carriers over whose lines the shipments moved. In the absence of proof by the carriers that the damage was not caused by their negligence, for which they

or either of them could be held liable, the law imputes negligence to them and, under the provisions of Section 20 of the Hepburn Amendment to the Interstate Commerce Act of 1906, C. 3591, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909], the initial carrier is chargeable with primary liability for the loss of the shipment in transit. No point is made, however, that the shipper failed to proceed against the initial carrier, and it may be assumed that whatever liability there may be is chargeable to the defendant in error. In the absence of any lawful special contract determining the value of the shipments, it is admitted that the defendant in error would be required, under the law, to respond by paying the full measure of loss sustained by plaintiff.

The record discloses, however, that the tariff in effect at the time the shipments moved provided rates of \$1.02 and \$1.50, respectively, upon "spirits in wood" and "whiskey in wood", and that, upon the payment of such rates by the shipper, the carrier was obligated to transport the shipments under its common law and statutory liability, which would require it, in the case of loss of or damage to the shipments, to pay the shipper the actual loss which he had sustained. The tariff also provided alternative rates of 85c and \$1.25, respectively, upon "spirits in wood" and "whiskey in wood", when the shipments were made at the "released value" of 50c per proof gallon and so receipted for, etc. These rates were regularly published and filed in com-

pliance with the provisions of the Act to Regulate Commerce, (supra). Under these tariff provisions, the shipper could elect whether he would pay the higher rate, and in such case reserve the right to hold the carriers liable as insurers under their common law and statutory liability, or pay the lower rate, in the event he agreed in advance that the shipments were of a value of 50c per gallon, and that this amount should be the measure of damages which he could recover in the event the shipments were lost or damaged in transit. All the shipments in question were made by the shipper, at his option, under the so-called "released rate", the lower alternative rate, and the shipper has paid this lower rate in each case.

Plaintiff in error, however, now claims that the carriers must compensate him for the full value of the shipments which were damaged or lost, because of the negligence imputed to the carrier by law, notwithstanding the special contracts evidenced by the bills of lading, season freight release and tariffs, which are read into the contract by operation of law, and which provided in effect that if the shipments were lost in transit, the carrier should respond to the shipper by paying 50c for each gallon of spirits or whiskey which had been shipped.

To state the case plainly, *the shipper elected* to avail himself of the lower alternative rate but, finding that the shipments were damaged or lost in transit, now seeks to recover the full measure of the damages which the carriers would have been

obliged to pay him had he shipped at the higher rate.

It is conceded by counsel for plaintiff in error that by virtue of the provisions of the special contracts, the shipper could not recover if the agreed value of the shipments approximated their actual value. And this concession necessarily carries with it the recognition of the well established rule of law that while a carrier cannot enter into a contract to relieve itself from liability for all negligence, nevertheless it may, by special contract, agree in advance upon the value of the shipment; in other words, liquidate in advance the damages which might be caused to the shipment while in transit.

The sole question, therefore, which is presented to this Court for determination is whether shippers and carriers may, by special contract, agree in advance upon the value of a shipment which is tendered to the carrier for carriage without reference to its actual value, or stated in other words, whether the shipper and carrier may, by special contract in anticipation of possible damages, liquidate those damages without reference to the actual value of the shipment.

It is submitted that this question must be determined affirmatively, whether reference is had solely to the rules which obtain under the common law or whether reference also be had to the declared policy of the State of California as disclosed by its statutes and the decisions of its Courts.

THE SPECIAL CONTRACTS PROVIDING FOR
AGREED VALUATIONS ARE VALID
AND ENFORCEABLE UNDER THE
RULES OF THE COMMON LAW

Leaving out of consideration questions relating to the declared policy of this State with reference to special contracts, such as were executed in the case at bar, and having reference only to the common law rules which would govern in cases such as this, it will be found that the Supreme Court of the United States, in the leading case of *Hart vs. Pennsylvania Railroad Co.*, 112 U. S. 331, has determined the precise point in controversy favorably to the contentions of defendant in error. Mr. Justice Blatchford's learned exposition of the carrier's common law liability, and his statement of the rules which govern the right of carriers to exempt themselves in special cases from the severe liability which is imposed upon them by the common law, has been accepted by the Federal courts and by a great majority of the state courts. In subsequent cases where the Supreme court has had occasion to determine questions relating to those which were decided in the Hart case, it has served as a foundation of its decisions. The facts of the Hart case are largely similar to those of the case at bar, and the court decided the precise question which is raised herein.

The defendant carrier had published alternative rates for the carriage of livestock, which were based

primarily upon the value of the livestock. Hart exercised his option, as did the plaintiff in error in the case at bar, to ship at the alternative rate, which was obtainable only where the livestock did not exceed the value fixed by the "released rates". The horse shipped by Hart and which was killed in transit, was alleged to be of the value of \$15,000.00, whereas by virtue of the tariff and bill of lading Hart had declared at the time the horse was shipped that it was of no greater value than \$200.00.

The facts in the Hart case are identical with those in the case at bar in this particular; and the court found in both cases that "if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged."

In the Hart case the Supreme Court held, as was held by the trial judge in the case at bar, that "the rate of freight is indissolubly bound up with the valuation".

And it is well at the outset to indicate clearly that the shipper in the case at bar, by electing to ship at the lower rate, actually fixed the rate himself, and that this lower rate was determined primarily by reason of the fact that the risk, a fundamental element in the making of rates, was lessened.

In the Hart case, the Supreme Court held that "if the rate of freight named was the only one offered by the defendant, it was because it was a

rate measured by the valuation expressed. If the valuation was fixed at that expressed when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight". p. 337.

The Court then goes on to determine the question whether a value fixed upon the shipment at the time it is delivered to the carrier must be taken as the value of the shipment as well in cases where the value is suggested or fixed by the carrier, as in cases where the shipper himself declares the value without suggestion from the carrier.

The Supreme Court says (338)—

"We see no sound reason for this distinction. The valuation named was the 'agreed valuation', the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on the condition that such was the valuation and that the liability should go to that extent and no further."

It is clearly pointed out that the rule announced by the Court must obtain, irrespective of the fact that the actual value of the shipment is wholly disproportionate to the agreed value (\$15,000.00 against \$200.00), because, as the Court says: "the articles have no greater value for the purpose of the contract of transportation between the parties to that contract * * * *" than the value to which the shipper and carrier have agreed, and that

“the carrier must respond for negligence up to that value”. But the Court goes on to say that “it is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld”. Plaintiff in error here, like the plaintiff in the Hart case, did not in the course of the trial raise the point that he did not fully understand the terms of the entire contract, or that he was induced to sign it under any misapprehension. But even if it had not been conceded by counsel that the contract was fairly made, this Court must indulge the presumption that such was the fact in the absence of proof to the contrary and especially where, in cases such as this, the record discloses that the shipper was accustomed to make frequent shipments of these same commodities between the same points, and for the mutual convenience of himself and the carriers executed a special agreement which enabled him to take advantage of the lower rate upon all his shipments by executing the contract known as the “season freight release”, which obviated the necessity of agreeing in advance upon every particular shipment.

In this connection exception must be taken to the following language found in the brief for plaintiff in error, page 9:

“The Court will note particularly that in both the Hart and Donlon cases a fair alternative was offered to the shipper. In the case at bar no such alternative was offered, nor could it have been specially offered in the case at

bar as both parties were bound by a published tariff, provided for by the Interstate Commerce Act and neither shipper nor carrier could deviate from the rates so published without suffering severe penalties."

The record discloses without conflict, as has already been pointed out herein, that alternative rates were in effect and that the shipper might elect under which rate he would ship; and not only is the lower rate presumed to be reasonable because the element of risk is subordinated to some extent to the other factors which are taken into consideration in making rates, but the Court will indulge the presumption that the higher rate is likewise a reasonable, just and nondiscriminatory rate, especially when plaintiff inferentially questions this rate for the first time in his brief.

Chicago Great Western Ry. vs. I. C. C., 209 U. S. 108, 119.

In support of the proposition that the federal courts will hold contracts, such as were executed in the case at bar, to be lawful and will follow the rule announced by the Court in the Hart case, the Court's attention is directed to the case of *Cau vs. Texas & Pacific Railway Co.*, 194 U. S. 427, 431, and to the case of *Pennsylvania Railroad Co. vs. Hughes*, 191 U. S. 477, 485, and particularly to page 486 of the latter decision, wherein the Court holds that—

“The cases are numerous and conflicting, different rules prevailing in different states. The federal courts, in cases of which they have jurisdiction, will doubtless continue to follow the rule of the Hart case * * *.”

In deciding the case of *Pierce vs. Wells Fargo & Co.*, 189 Fed. 561, the Circuit Court of Appeals for the 2nd Circuit, in a well considered opinion, predicated its decision upon the Hart case and decided the case in strict conformity with the principles announced by the Supreme Court of the United States and held, that although the carrier had arbitrarily fixed a value for all packages without regard to their real value, the shipper should be held to have assented to the limitation contained in the bill of lading in consideration of the reduced alternative rate and that he could recover no more than \$50.00, a value arbitrarily fixed by the *carrier*, although the shipment was of the actual value of \$15,000.00.

Counsel for plaintiff in error, however, assumes the attitude of asking this court to reverse the Supreme Court of the United States under the authority of the Interstate Commerce Commission, and points to the decision rendered by the Commission entitled “In the Matter of Released Rates”, 13 I. C. R. 550, wherein the Commission undertakes to analyze and differentiate the Hart case. But, as was pointed out by the opinion of the learned trial judge in the case at bar, 184 Fed. 489, 493-494, “a careful reading of the opinion” (of the Commission)

“in that case will disclose that this statement involves an obviously erroneous conception of the ground on which the conclusion of the Supreme Court was rested”, and the opinion then demonstrates that the decision in the Hart case was not rested upon the principle of estoppel. But, however this may be, the opinion of the Interstate Commerce Commission in a matter such as this can carry no weight, if for no other reason than that the Commission preface their own opinion by a statement of a proposition which is selfevident, quoting its language, “inasmuch as the Commission does not take jurisdiction over claims for damages to goods in transit, it must be recognized that this problem is essentially one for the courts * * *”. And for this reason it seems unnecessary to pause to point out wherein the Commission’s opinion is in conflict with the decisions of the Federal Courts.

The decisions of the Supreme Court of the United States, to which reference has been given, control.

THE DECLARED POLICY OF THIS STATE
RECOGNIZES THE VALIDITY OF SPECIAL
CONTRACTS LIMITING THE LIABILITY
OF THE CARRIER.

The District Court became vested with jurisdiction of this action solely by reason of the diversity of citizenship of the parties. No federal question was raised, and it is not asserted that any of the rights guaranteed to the plaintiff in error under the constitution or laws of the United States were in-

vaded or denied, and the trial judge therefore rightly concluded that the questions raised should properly be determined in conformity with the declared policy of the State of California, as disclosed by its statutes and the decisions of its courts, following in this particular the decision of the Supreme Court of the United States expressed in the case of Pa. RR Co. vs. Hughes, 191 U. S., 477.

An examination of the statutes of the State of California, (sections 2174-2175 Civil Code California), which are not merely declaratory, but also operate to extend and broaden the common law rule, will disclose the declared policy of the State to be, that the obligations of common carriers may be limited by special contract, provided that the common carrier does not endeavor to exonerate itself by any agreement made in anticipation thereof from liability for gross negligence, fraud or willful wrong of itself or its servants.

The Supreme Court of the State of California has interpreted these code sections in a case where the facts are analogous to those in the case at bar.

Donlon vs. SP Company, 151 Cal., 763.

The decision of the State court in this case is predicated upon the rules announced by the Supreme Court in the Hart case, and the precise question at issue here was expressly determined by the State Supreme court. It therefore does not become necessary for this court to determine whether the rules announced in the Hughes case *supra* are properly applicable, because there is com-

plete harmony in the decisions of the Federal courts, and the decision of the Supreme court of this State.

It is necessary, however, to call the court's attention, in passing, to the fact that while in the Donlon case the jury found that the loss of the freight was occasioned by the *gross* negligence of the carrier, no attempt was made to prove that the shipments in the case at bar were lost or damaged by reason of the *gross* negligence of the defendant in error or its eastern connections, but the plaintiff in error rested by showing loss and invoking the rule which imputes negligence to the carrier in the absence of an affirmative showing that the shipments were lost because of causes beyond its control.

In the Donlon case, the agreed value of the shipment was \$20.00 for each horse, although the actual value, as found by the jury was \$200.00 for the horse which was injured and \$350.00 for the horse which was killed. As in the case at bar, the tariff provided for alternative rates, the lower rate being conditioned upon the carrier assuming a proportionately less risk. In this particular, it is important that the court bear in mind that the purpose of agreeing upon the value of a shipment in advance, as is held by the court in the Hart, Solan and Donlon cases, is not only to measure and fix the responsibility of the carrier, but also for the purpose of fixing the rate which shall be charged by the carrier and paid by the shipper.

In the Donlon case, the court says, page 769:

“The primary purpose of this contract was, as the rates of transportation charged by the carrier were measured by the valuation of the property shipped, to fix an agreed valuation of the horses in question as a basis upon which freight rates should be charged and paid, on condition that in case of loss the responsibility of appellant should be measured by such agreed valuation. *The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability.* It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property—its actual valuation for all purposes of the contract; and as appellant assumed responsibility for loss to the full extent of such valuation there is no room for claiming that the contract was an attempt to exonerate it from the liability which the statute imposed. On the contrary, it assumed under it full liability for the actual value as that actual value was agreed on. * * * * *

Full responsibility under the statute for the loss of the property carried could not exceed its actual value, and while under the statute a carrier cannot by contract exonerate itself from liability for such value, there is nothing in the statute which prohibits the parties by contract from determining freely in

advance what the actual value of such property is as the measure of the responsibility of the carrier when it attaches."

In passing upon the precise question which is raised here upon appeal, the Supreme Court of the state, at pages 775, 776 said:

"Nor in determining whether such a contract is fair or reasonable, can there be taken into consideration the fact whether the agreed value of the property reasonably approximated its real value. That question was presented in some of the cases cited. In *Hill v. Northern Pacific Ry. Co.*, 33 Wash. 697, (74 Pac. 1054), in reply to a contention of counsel for appellant urging that it should, the court said: "An examination of the cases cited we do not think sustains this contention, and even where there has been an attempt to make this distinction, it has been in principle a failure. The contract establishing the released valuation must be construed to embrace the real valuation." In the Hart case, 112 U. S. 331, 337, which was a suit relative to the value, as here, of racehorses, the court dismisses that contention as without merit, saying: "Although the horses, being racehorses, may aside from the bill of lading have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixes. * * *"

In *Steers v. L. N. Y. and P. S. S. Co.*, 57 N. Y. 1, (15 Am. Rep. 453), the agreed valuation of the trunk in question was fifty dollars, whereas it was shown that the value of its

contents exceeded one thousand dollars. *In Zimmer v. New York etc. R. R. Co.*, 137 N. Y. 460, (33 N. E. 642), the agreed valuation was one hundred dollars, though the value thereof found by the jury was over three thousand dollars. And in all the other cases cited sustaining such special contracts, necessarily the actual valuation must have exceeded the agreed valuation, and the question whether it did or not must have been held to be immaterial."

THE CONFLICT IN THE AUTHORITIES HAS
RESULTED FROM THE DIFFERENCE IN
THE DECLARED POLICY OF THE
FEDERAL COURTS AND OF THE
COURTS OF THE SEVERAL
STATES.

Counsel for plaintiff in error correctly states, that there is considerable actual conflict in the authorities, but this conflict is explainable by an examination of the decisions which have been rendered by the Federal and State courts, which disclose that where the rules are different from those announced by the Federal courts and the courts of California, it is because the declared policy of the state has been against permitting carriers and shippers to freely agree in advance as to the value of shipments.

In the Hart case the Supreme Court of the United States says: "The decisions in this country are at variance", and then goes on to cite cases which support the rule which it regards as the

proper one to be applied, and then cites several cases in which a contrary rule is sustained. After citing these authorities the court holds: "We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions". In the Hughes case, page 486, the court states: "The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts, in which they have jurisdiction, will doubtless continue the rule in the Hart case * * *".

It is, therefore, respectfully submitted that in deciding the case at bar, this court is bound by the rules announced by the Federal courts and by the court of the State of California, which declares the rules to be not only in accord with the policy announced by the Federal courts, but with the declared policy of the state expressed by legislative enactment.

CONGRESS HAS NOT LEGISLATED ON THIS SUBJECT.

The counsel seeks to invalidate the special contracts upon which the defendant in error relies by reference to Section 20 of the Act to Regulate Commerce, as amended by the Hepburn Amendment in 1906 (U. S. Comp. St. Supp. 1907, page 909).

The paragraph quoted at page 16 of the brief of plaintiff in error was not designed to cover the case which is here presented. The declared purpose of

that statute was to overcome the rule which had been uniformly recognized by the Federal and State courts of compelling the shipper to prove that shipments had been lost or damaged upon the line of some one of several carriers forming a through route; and, as the statute clearly indicates, it intended to do no more than to abrogate this rule and impose upon the initial carrier of the through route primary liability and responsibility for loss of or damage to shipments, no matter upon which line the loss or damage occurred.

This question has been set at rest by the decisions rendered in the cases of *Smeltzer vs. St. L. & S. F. R. Co.*, 158 Fed. 649, 666-667 and *Riverside Mills vs. A. C. L. R. Co.*, 168 Fed. 987, 989, wherein the courts sustained the constitutionality of this section and defined its scope and purpose.

It necessarily follows, that in the absence of congressional legislation, the policy declared by the Federal court and by the Legislature and courts of the State of California must govern. *Pa. R. Co. vs. Hughes*, *supra*; *M. K. & T. Ry. Co. vs. Haver*, 169 U. S. 613, 635.

THE BONA FIDES OF THE TRANSACTION.

As already indicated, some suggestion is made in the brief for plaintiff in error to the effect that the carrier did not deal fairly with shipper, but it was conceded by counsel for plaintiff in error during the trial that the shipper did have an opportunity

of electing to pay the higher or lower rate, and as a matter of fact the tariff references contained in the record show conclusively that alternative rates were in effect, and that the shipper exercised his option to ship at the lower alternative rate under the agreed valuation instead of the higher rate which carried with it the obligation on the part of the carrier to respond to the full amount of damage which the shipper actually sustained.

The statements, therefore, made by counsel at page 9 of his brief already quoted herein, and the statement at page 12 of the brief are not supported by the facts. If there has been any attempt to take an unfair advantage in these transactions, the charge must rest upon the shipper, because it has been demonstrated that after having elected to ship at the lower rate, he now seeks to invoke the aid of this court in recovering a greater sum than that to which he is entitled under the provisions of the tariff.

Both of the alternative rates are presumed to be reasonable.

Chicago Great Western Ry. Co. vs. ICC,
209 U. S., 108, 119.

There can be no departure from the tariff rates which the shipper *elected* to pay and under which the shipments were actually made.

Railroad Co. vs. Mugg, 204 U. S. 242;
Hefley vs. Railway Co., 158 U. S. 98;
A. J. Poor Grain Co. vs. C. B. & Q. Ry. Co.,
12 I. C. R. 418;

decisions which have been rendered by the Supreme Court of the United States and other Federal Appellate Courts and the Supreme Court of the State of California, and likewise the Appellate Courts of a majority of the states. By so doing this Court will confirm the public policy expressed by the people of the State of California through their Legislature, and likewise the declared policy of the Federal Courts and many of the State Appellate Courts.

Respectfully submitted,

GUY V. SHOUP and

C. W. DURBROW,

Attorneys for Defendant in Error.

WM. F. HERRIN,

Of Counsel.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,
a Corporation,

Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Corpor-
ation,

Appellee.

Upon Appeal From the United States District
Court for the District of Oregon.

APOSTLES

RECEIVED

MAR 6 - 1912

F. D. MONCKTON,
CLERK.

FILED

MAR 28 1912

No.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,
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Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Corpor-
ation,

Appellee.

Upon Appeal From the United States District
Court for the District of Oregon.

APOSTLES

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,
a Corporation,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,
ation,

**NAMES AND ADDRESSES OF PROCTORS
ON THIS APPEAL**

For the Appellant:

MALARKEY, SEABROOK & STOTT,
Yeon Building, Portland, Oregon.

For the Appellee:

JESSE STEARNS,
JOHN H. HALL,
Railway Exchange Building, Portland, Oregon.

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[Statement of the Clerk of the United States District
Court]

*In the District Court of the United States for the
District of Oregon.*

CENTRAL DOOR & LUMBER CO., a Corporation,
Libellant,

vs.

CALIFORNIA-ASIATIC STEAMSHIP CO.,
Respondent.

Be it remembered that on the 5th day of July, 1911, a libel was filed in the District Court of the United States for the District of Oregon, by the Central Door and Lumber Company, libellant, against the California-Asiatic Steamship Company, respondent, and on the said 5th day of July, 1911, a monition was duly issued out of said Court and service thereof duly made, requiring the respondent to appear and answer the libel at the next rule day. That thereafter on the 9th day of August, 1911, a stipulation was filed extending the time of the respondent to answer to and including August 21, 1911; that thereafter on the 27th day of October, 1911, an order adjudging respondent in default was duly entered, and on the 30th day of October 1911, a final decree was entered in said cause. That thereafter on the 1st day of November, 1911, respondent filed a motion to vacate and set aside the decree and for leave to answer in the cause, based upon affidavits therewith filed, and on the

13th day of November, 1911, said motion to vacate was, after argument, denied.

That on the 12th day of December, 1911, said respondent filed in this Court its notice of appeal from the decree of this Court to the United Circuit Court of Appeals, Ninth Circuit, and on the same day filed its undertaking on appeal and for stay of execution, and thereafter on the 22nd day of January, 1912, filed its assignments of error. That on the 22nd day of January, 1912, an order was made and signed in said cause by the Honorable Charles E. Wolverton, District Judge for the District of Oregon, extending time for filing the record on appeal in said cause in the United States Circuit Court of Appeals, Ninth Circuit, to and including the 22nd day of March, 1912.

In testimony whereof I have hereunto set my hand and the seal of said Court, at Portland in said District this 5 day of February, 1912.

A. M. CANNON,

Clerk of the United States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

July Term, 1911.

Be it remembered that on the 5 day of July, 1911, there was duly filed in the District Court of the United States for the District of Oregon, a Libel in in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

Libel.

CENTRAL DOOR & LUMBER CO., a Corporation,
Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO,
a Corporation,
Respondent.

To Hon. Robert S. Bean and Charles E. Wolverton,
Judges of the District Court of the United States,
for the District of Oregon.

The libel and complaint of Central Door & Lumber Company, an Oregon Corporation, against California-Atlantic Steamship Company, a foreign Corporation, in a cause of action, civil and maritime of a nature hereinafter more specifically set forth, alleges as follows:

First: At all the times hereinafter mentioned libelant was a corporation, organized and existing under the laws of the State of Oregon, having its principal office and place of business in the City of Portland, in the District and State of Oregon, and was lawfully engaged in the business of buying, selling and dealing in paints, glass, roofing, building paper, building materials, and other goods, wares and merchandise.

Second: At all the times hereinafter mentioned and for a long time previous thereto, Respondent was a Corporation, organized and existing under the

4 *California-Atlantic Steamship Company*

laws of some state or country foreign to Oregon, as to which Libelant is unable to state with more certainty at this time; but J. E. Laidlaw, with an office in the Railway Exchange Building, Portland, Oregon, is its Manager or Agent for the collection of freights, and handling its business and traffic in said port; and Respondent was and is a common carrier, and owned or chartered divers steamships which respondent employed in carrying cargo between Philadelphia and other Atlantic ports, and Portland and other Pacific ports; and among the steamships so owned or chartered by respondent, were the steamships "MILLS" and "STANLEY DOLLAR."

Third: That heretofore on or about the month of December, 1910, pursuant to arrangement theretofore made with respondent, libelant shipped and caused to be shipped in good order and condition, on board the steamship "MILLS", then lying in the port of Philadelphia, and then bound to the Isthmus of Panama, to be transported in said Steamer and connecting lines and steamers to Portland, Oregon, one barrel and two kegs of liquid white paint, sixteen cases of plate glass, 2200 rolls of asphalt roofing, known as Genasco and Phoenix, 800 rolls of deadening felt, known as Atlas Insulating, and 2721 rolls of building paper, known as Sheepskin Sheathing. All of said merchandise was properly packed for carriage and handling, and was duly consigned to libelant at Portland, Oregon, and libelant also directed respondent to insure said shipments for libelant's account.

Fourth: On or about the 22nd day of February, 1910, respondent at Portland, Oregon, notified libelant that said goods and merchandise had arrived by its steamship "STANLEY DOLLAR," and were ready for delivery to said libelant upon payment of charges, including freight advanced to railroads, insurance premiums, and freight earned by respondent, and respondent presented bills for said charges amounting to \$1233.81, while said merchandise was still in the hold of the said steamship and before libelant had any opportunity to examine the same and discover its order and condition, and libelant paid respondent said sum of \$1233.81, and thereupon respondent delivered said merchandise to libelant in the damaged condition hereinafter stated.

Fifth: Upon unpacking and examining said merchandise, libelant found that all of the building paper had been water soaked, compressed, broken and otherwise damaged, and was thereby made worthless; that all the asphalt roofing had been melted and run by heat, broken and pressed into masses and otherwise damaged, and was thereby rendered worthless; that the glass had been damaged by breakage, a large portion of it being broken into small bits; the barrel and kegs of paint were broken, and the contents had nearly all escaped and wasted, and a large part of the entire shipment was rendered valueless, all owing to the negligence of respondent in stowing and handling said merchandise.

Sixth: The market value of the deadening felt, roofing, building paper and glass of the quantity,

quality and sizes, shipped by libelant and destroyed by the negligence of respondent as aforesaid, at the City of Portland, on the 22nd day of February, 1911, the date of arrival of said merchandise, was \$5988.81, including the charges paid to respondent, all of which became and was a total loss to libelant; of all of which respondent had prompt and timely notice. And libelant is entitled to interest on said sum from February 22, 1911.

Seventh: Libelant's loss aforesaid was without fault or negligence on the part of libelant, but was occasioned solely by the negligence and misconduct of the respondent, its employees, agents, or servants in the following particulars, among others:

The asphalt roofing was not properly handled, stowed and carried by respondent, by being placed with the rolls in a perpendicular position and by being kept free from heat, but was so stowed and carried by respondent, its employees, agents, and servants, that it was exposed to heat, and the rolls were piled and packed and carried in a horizontal position, so that the melting and softening of the material, the pressure and weight upon it in the manner that it was stowed and carried compressed it into formless masses, broke the fiber and rendered it useless for any purpose.

The building paper was negligently and improperly stowed, carried and handled by respondent, its employees, agents and servants, whereby it was soaked with water, pressed, broken, and made a pulpy mass, and rendered useless for any purpose.

The glass was improperly stowed, carried and handled by respondent, its employees, agents and servants, whereby it was broken so that out of the entire shipment only 185½ square feet was saved, and this in such small pieces that the value of the salvage was only 40 cents per square foot.

The barrel and kegs of paint were so negligently and improperly stowed, carried and handled by respondent, its employees, agents and servants, that the packages were broken and all but eight gallons of the sixty-two gallons shipped were spilled, wasted and lost.

The respondent neglected to insure said shipment and to deliver insurance policies to libelant; and respondent has failed to collect and pay or cause to be paid any insurance to libelant on account of the said loss and damage, although libelant paid respondent certain sums, for which respondent presented bills, as insurance premiums.

The respondent is chargeable with other faults and negligences, which libelant prays it may be permitted to specify more particularly at the trial hereof.

Eighth: Attached hereto and made a part hereof is a schedule marked "Schedule A," setting forth in detail the kinds, quantities, qualities and market value of the goods shipped by libelant and damaged as aforesaid, and made a total loss by the negligence of respondent, amounting to the sum of \$6988.81, as aforesaid, including the freight, insurance and other charges, paid to respondent by libelant, after deducting all allowances for salvage, on the goods shipped.

Ninth: That the respondent is, as heretofore alleged, a foreign Corporation, as libelant is informed and believes, and has property within the jurisdiction of this Honorable Court, to-wit:

A certain Steamship called the "STANLEY DOLLAR," and certain freight moneys earned by the said Steamship.

Tenth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the course and practice of this Honorable Court may issue against said respondent, the President, or officers thereof, and that they may be required to answer on oath this Libel and the matters herein contained, and that if said Company cannot be found, then that the goods, chattels, credits and effects thereof within the jurisdiction of this Court may be attached to an amount sufficient to answer the libelant's claim, and that this Honorable Court will be pleased to decree to libelant, the payment of the amount which shall be due unto it for the cause aforesaid and that the respondent may be condemned to pay the same with interest thereon, and the costs of this suit, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

CENTRAL DOOR & LUMBER COMPANY,

By ALFRED F. BILES,

President.

United States of America,
District of Oregon,—ss.

Alfred F. Biles, being duly sworn says that he is the President of Central Door & Lumber Company, an Oregon Corporation, the libelant above named; that deponent has read the foregoing Libel, and that the same is true to the best of his knowledge.

Sworn to before me this 5th day of July, 1911.

W. W. WOODCOCK,
Notary Public for Oregon.

[Notarial Seal] JESSE STEARNS, and
JOHN H. HALL,
Proctors for Libelant.

10 *California-Atlantic Steamship Company*

We manufacture Mirrors Genasco Roofing

CENTRAL DOOR & LUMBER COMPANY

Jobbers of

Plate Glass, Window Glass, Rough Glass, Doors,

Windows, Mouldings, Building Material

Corner Thirteenth and Glisan Sts.

Charge No. Pacific Phone Marshall 1800

Home Phone A 6264

Schedule A.

Portland, Oregon,

Sold to California-Atlantic S. S. Co.,

Bates & Cheeseborough, Agts.

To loss and damage on goods arriving per "STANLEY DOLLAR,"
Feb. 22, 1911.

1 bbl. Liquid White Paint, 52 gals.....	\$1.75	\$ 91.00	
2 kegs Liquid White Paint, 10 gals.....	1.85	18.50	
		<hr/>	
		\$109.50	
Less Salvage, 8 gals.....	1.75	14.00	95.50
		<hr/>	
Shipped by J. W. Masury & Son, New York, N. Y.			
Case No. 8 Plate Glass—total loss, 690¾ ft.			
7 to 12 sq. ft.....	.50	345.38	
Case No. 18 Plate Glass,—total loss, 448-1-10			
ft. 7 to 12 sq. ft.....	.50	224.05	
Case No. 24 Plate Glass—27 plts. broken,			
190 5-6 sq. ft.50	95.40	
Case No. 9, 20 Plates broken, 210¼ sq. ft....	.50	105.12	
Case No. 23, 10 Plates broken, 107 1-3 sq. ft. .	.50	53.67	
Case No. 84, 46 Plates broken, 153 1-3 sq. ft. .	.35	52.67	
Case No. 5, 8 Plates broken, 82 2-3 sq. ft.....	.50	41.33	
Case No. 4, 5 Plates broken, 42¾ sq. ft.....	.50	21.38	
Case No. 19, 5 Plates broken, 35 1-6 sq. ft....	.50	17.59	
Case No. 6, 9 Plates broken, 92 5-6 sq. ft.....	.50	46.42	
Case No. 7, 7 Plates broken, 67¼ sq. ft.....	.50	33.62	
Case No. 10, 4 Plates broken, 36 sq. ft.....	.50	18.00	
Case No. 12, 8 Plates broken, 43½ sq. ft.....	.50	21.75	
Case No. 25, 3 Plates broken, 28 1-3 sq. ft....	.50	14.17	
		<hr/>	
		\$1090.55	
Less Salvage, 185½ sq. ft.....	.40	74.20	1016.35
		<hr/>	

Shipped by Edw. Ford Plate Glass Co., Rossford, O.

Forward.....\$1111.85

Sold to California-Atlantic S. S. Co.,

Bates & Cheeseborough, Agts.

Balance Forward			\$1111.85
2237 rolls Sheepskin Sheathing—total loss....	.54		1207.98
Shipped by L. H. Cheeseman Co., Detroit, Mich.			
471 rolls 1-ply Atlas Insulating Paper, 500			
sq. ft, total loss99	466.29	
238 rolls 2-ply Atlas Insulating Paper, 500			
sq. ft., total loss	1.53	364.14	830.43
Shipped by Keystone Roofing Mfg. Co., York, Pa.			
150 rolls 150 squares ½-ply Genasco Roof-			
ing	1.20	180.00	
132 rolls 132 squares 1-ply Genasco Roof-			
ing	1.50	198.00	
42 rolls 42 squares 2-ply Genasco Roofing	2.10	88.20	
70 rolls 70 squares 3-ply Genasco Roofing	2.70	189.00	
100 rolls 200 squares ½-ply Genasco Roofing	1.20	240.00	
100 rolls 200 squares 1-ply Genasco Roofing	1.50	300.00	
148 rolls 296 squares 2-ply Genasco Roofing	2.10	621.60	
150 rolls 150 squares ½-ply Phoenix Roofing	.95	142.50	
131 rolls 131 squares 1-ply Phoenix Roofing	1.19	155.89	
150 rolls 150 squares 2-ply Phoenix Roofing	1.66	249.00	
98 rolls 98 squares 3-ply Phoenix Roofing	2.14	209.72	
100 rolls 200 squares ½-ply Phoenix Roofing	.95	190.00	
100 rolls 200 squares 1-ply Phoenix Roofing	1.19	238.00	
252 rolls 504 squares 2-ply Phoenix Roofing	1.66	836.64	
			\$3388.55
All total loss.....			\$6988.81

Shipped by Barber Asphalt Paving Co., Maurer, N. J.

[Endorsed]: No. 5374. In the U. S. District Court for the District of Oregon. Central Door & Lumber Co., a corporation, vs. California-Atlantic S. S. Co., a corporation. Libel in Personam.

Filed July 5, 1911. A. M. Cannon, Clerk, by G. Clark, deputy. Let Warrant issue, July 5, 1911, Bean, Judge. Jesse Stearns and J. H. Hall, Proctors for Libellant.

And afterwards, to wit, on the 9 day of August, 1911, there was duly filed in said Court a Stipulation in words and figures as follows, to wit:

12 *California-Atlantic Steamship Company*

*In the District Court of the United States for the
District of Oregon.*

CENTRAL DOOR & LUMBER COMPANY,
a Corporation,

Libelants,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY, a Corporation,

Respondent.

Stipulation.

It is hereby agreed and stipulated by and between the parties to the above entitled suit, appearing by their respective attorneys, that the respondent may have up to and including August 21, 1911, within which to file a further appearance in the above entitled suit, and that an order to that effect be entered herein.

JESSE STEARNS & J. H. HALL,

Proctors for Libellant.

MALARKEY, SEABROOK & STOTT,

Proctors for Respondent.

[Endorsed]: No. 5374. Stipulation extending time within which to appear. Filed August 9, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on Wednesday, the 9 day of August, 1911, the same being the 32 Judicial day of the Regular July, 1911, term of said Court; Present, the Honorable Chas. E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time for Appearance.]

*In the District Court of the United States for the
District of Oregon.*

No. 5374.

CENTRAL DOOR & LUMBER COMPANY,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY,

August 9, 1911.

Now, at this day, based upon the stipulation of the parties filed herein it is ordered that the respondent herein be, and it is hereby, allowed to August 21, 1911, in which to enter its appearance herein.

And afterwards, to wit, on Friday, the 27 day of October, 1911, the same being the 100 Judicial day of the Regular July, 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Adjudging Default.]

*In the District Court of the United States for the
District of Oregon.*

No. 5374.

In Admiralty.

October 27, 1911.

CENTRAL DOOR & LUMBER CO., a Corporation,
Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO.,
a Corporation, Respondent.

A libel in personam with a clause of foreign attachment having been filed in this cause on the 5th day of July, 1911, and a citation having been duly issued to respondent, directing it to appear and answer unto libelant on the 7th day of August, 1911, and respondent having appeared on the 19th day of July, 1911, and filed its stipulation for cost and its stipulation for value in discharge of the attachment levied on its credits, and having procured further time by stipulation, to and including August 21, 1911, in which to file a further appearance; and the respondent having since neglected and refused to answer the libel, or to further move in the cause, and being now in default,

Now, at this time on motion of Mr. Jesse Stearns, proctor for libelant, it is ordered that the defaults of respondent and its surety, Massachusetts Bonding & Insurance Company be and the same hereby are accordingly entered, and that said respondent and its said surety be condemned to pay the demands of said libelant.

And it is further ordered that libelant appear before the Court and present its proofs on the 30 day of October 1911, at the opening of court on that day.

And afterwards, to wit, on Monday, the 30 day of October, 1911, the same being the 102 Judicial day of the regular July, 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*In the District Court of the United States for the
District of Oregon.*

No. 5374.

Final Decree.

CENTRAL DOOR & LUMBER COMPANY, a
Corporation,

Libelant.

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY, a Corporation,

Respondent.

The defaults of the respondent and its surety, Massachusetts Bonding & Insurance Company, having been heretofore entered, and this cause coming before the Court this day to be heard, now after reading the libel, and hearing the proofs adduced by libelant, and the Court having fully considered the same, now on motion of Jesse Stearns, proctor for libelant, it is

Ordered, Adjudged and Decreed that the libel be and the same hereby is amended to conform to the proof of damage sustained by the libelant, viz: by increasing the amount claimed in the libel to \$7288.42 with interest thereon as prayed in said libel.

And the Court having found that the libelant has sustained damages by reason of the negligence of the respondent, in the sum of \$7288.42, with interest thereon at six per cent, from February 22, 1911, to the date of this decree, amounting to \$291.54, with \$136.36 costs, it is further

16 *California-Atlantic Steamship Company*

Ordered, Adjudged and Decreed that the libelant recover herein against said respondent said sum of \$7288.42, with \$291.54 interest and \$136.36 costs, making the total sum of \$7716.32. And it is further

Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this Court, the libelant have execution to satisfy this decree; and that the stipulators for costs and value in behalf of respondent cause the engagements of their stipulations to be performed.

R. S. BEAN,
Judge.

[Endorsed]: Central Door & Lumber Co. vs. California, etc., S. S. Co. Decree. Filed Oct. 30, 1911. A. M. Cannon, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was duly filed in said Court, a Notice of Appeal in words and figures as follows to wit:

[Notice of Appeal.]

*In the District Court of the United States for the
District of Oregon.*

CENTRAL DOOR & LUMBER COMPANY, a
Corporation,

Libelant, and Appellee,
vs.

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY, a Corporation,

Respondent and Appellant.

To CENTRAL DOOR & LUMBER COMPANY,
Libelant and Appellee, and to Jesse Stearns and
John Hall, Proctors for Libelant:

You and each of you are hereby notified that the respondent above named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 30 day of October, 1911.

MALARKEY, SEABROOK & STOTT,
Proctors for Respondent and Appellant.

District of Oregon,—ss.

Due and legal service of the within Notice of Appeal this 12th day of December, 1911, is hereby admitted.

JESSE STEARNS,
of Proctors for Libellant.

[Endorsed]: No. 5374. In the United States District Court, District of Oregon. Central Door & Lumber Co., a corporation, vs. California-Atlantic S. S. Co., a Corporation. Notice of Appeal. Filed Dec. 26, 1911, A. M. Cannon, Clerk U. S. District Court. And afterwards, to wit, on the 26 day of December, 1911, there was duly filed in said Court, an order in words and figures as follows, to wit:

[Order Fixing Amount of Supersedeas Bond.]

*In the District Court of the United States for the
District of Oregon.*

CENTRAL DOOR & LUMBER CO., a Corporation,
Libellant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO.,
a Corporation,
Respondent.

This cause coming on to be heard upon the motion of California-Atlantic Steamship Co., a corporation, Respondent and Appellant, for an order fixing the amount of the bond on its appeal, for the purpose of staying execution of the decree so appealed from;

And it further appearing to the court that the Respondent and Appellant herein has filed a stipulation for costs in the sum of \$250;

And it further appearing to the court that the attorneys for Libelant and Appellee have consented and agreed that the bond on said appeal be fixed in the sum of \$10,000.00;

It is therefore ordered, adjudged and decreed that upon the filing by the Respondent and Appellant of a good and sufficient bond in the sum of \$10,000.00, duly approved by this court and the attorneys for Libelant and Appellee, that the execution on said decree so appealed from be and the same is hereby stayed.

Dated this 23rd day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant, vs. California-Atlantic Steamship Co., Respondent. Order. Filed December 26, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of December, 1911, there was duly filed in said Court, an Undertaking on Appeal in words and figures as follows, to wit:

[Undertaking on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

CENTRAL DOOR & LUMBER CO., a Corporation,
Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO.,
a Corporation,

Respondent.

Whereas, lately in the District Court of the United States for the District of Oregon, in a suit pending in said court between Central Door & Lumber Co., a corporation, Libelant, and California-Atlantic Steamship Co., a corporation, Respondent, a decree was rendered against said California-Atlantic Steamship Co. in favor of Central Door & Lumber Co. in said suit on the 30th day of October, 1911, for the sum of \$7,288.42, with \$291.54 interest and \$136.36 costs, making the total sum \$7,716.32; and

Whereas, said California-Atlantic Steamship Co., a corporation, Respondent in the above entitled suit, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 30th day of October, 1911; and

Whereas, the Hon. R. S. Bean, Judge of the above entitled court, on the 23rd day of December, 1911, made an order fixing the bond of the appellant in order to stay the execution of said decree in the sum of \$10,000.00

Now therefore in consideration of the premises and of said appeal, said California-Atlantic Steamship Co.,

a corporation, as principal, and Massachusetts Bonding and Insurance Company, a corporation, as surety, are bound unto said Central Door & Lumber Company, a corporation, in the sum of \$10,000.00;

Now, the condition of the above obligation is such that if the said California-Atlantic Steamship Co. appellant shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals in the cause, or on the mandate of the United States Circuit Court of Appeals by the District Court of the United States for the District of Oregon, then the above obligation to be void, else to remain in full force and virtue.

Signed, Sealed and Delivered this 23rd day of December, 1911.

CALIFORNIA-ATLANTIC STEAMSHIP CO.,

By J. E. LAIDLAW,

Its Attorney in Fact.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

By WALTER R. ROSSMANN,

Attorney in Fact.

Attest: JAMES D. HART,

Attorney in Fact.

Approved:

JESSE STEARNS,

Of Proctors for Libelant.

Approved Dec. 26, 1911.

R. S. BEAN,

District Judge.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant vs. California-Atlantic Steamship Co., Respondent. Undertaking on Appeal. Filed Dec. 26, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of January, 1912, there was duly filed in said Court, Assignments of Error in words and figures as follows to wit:

*In the District Court of the United States for the
District of Oregon.*

[Assignments of Error.]

CENTRAL DOOR & LUMBER COMPANY, a
Corporation,

Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY, a Corporation,

Respondent.

The California-Atlantic Steamship Company, respondent in the above entitled cause, appealing to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in this cause by the District Court of the United States for the District of Oregon on the 30th day of October, 1911, files and specifies this, its Assignments of Error on such appeal.

I.

The above entitled court sitting in admiralty erred in assuming jurisdiction over and rendering a decree upon a bill of lading providing for a carriage both by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, and issued upon a single freight consideration for the through carriage from Philadelphia, Pennsylvania, to Portland, Oregon.

II.

The said court erred in rendering a decree for injuries and damage to and loss of the liquid white paint sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said liquid white paint was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said liquid white paint was injured on navigable water and part on land, what portion thereof was injured on navigable water.

III.

The said court erred in rendering a decree for injuries and damage to and loss of the plate glass sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad

on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said plate glass was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said plate glass was injured on navigable water and part on land, what portion thereof was injured on navigable water.

IV.

The said court erred in rendering a decree for injuries and damage to and loss of the sheepskin sheathing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said sheepskin sheathing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said sheepskin sheathing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

V.

The said court erred in rendering a decree for injuries and damage to and loss of the Atlas insulating paper sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navi-

gable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Atlas insulating paper was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Atlas insulating paper was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VI.

The said court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Genasco roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Genasco roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Genasco roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VII.

The said court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Phoenix roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isth-

mus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Phoenix roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Phoenix roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VIII.

The said court erred in denying the application of the respondent for an order vacating and setting aside the default decree entered herein, and thereby refusing to permit and allow the respondent to make a defense on the merits.

IX.

The said court erred in assuming jurisdiction of this cause, because it is not within the admiralty and maritime or other jurisdiction of said court. It appears in the libel filed in said cause that the contract for the carriage of the goods mentioned in said libel was not a contract of afreightment by navigable water, but was a contract to carry said goods from Philadelphia, Pennsylvania, to Portland, Oregon, made upon a single freight consideration, and contemplated carriage both by navigable water and by land. It is not alleged in said libel that said contract was made upon navigable water; nor is it alleged in said libel that the injuries to the goods for which damages are asked occurred while said goods were on ship board or on navigable water; nor was any proof of-

ferred to show that said contract was made upon navigable water or that said injuries were done on ship-board or on navigable water.

X.

The libel in the above entitled cause wholly fails to state facts sufficient to constitute a cause cognizable in the above entitled court sitting in admiralty and said court erred in assuming jurisdiction of said cause.

XI.

Said court erred in rendering any decree in said cause other than a decree dismissing the libel.

XII.

Said court erred in not rendering a decree dismissing the libel herein.

Wherefore appellant and respondent prays that the decree rendered herein be reversed and that said District Court sitting in admiralty be directed to render a decree dismissing the libel herein.

MALARKEY, SEABROOK & STOTT,

WILLIAM DENMAN,

Proctors for Appellant and Respondent.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant, vs. California-Atlantic Steamship Co., Respondent. Assignments of Error. Filed January 22, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 22 day of January, 1912, the same being the 55 Judicial day of the regular November, 1911 term of said Court; Present: the Honorable Chas. E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

No. 5374.

January 22, 1912.

CENTRAL DOOR & LUMBER COMPANY, a
Corporation,

Libelant.

vs.

CALIFORNIA-ASIATIC STEAMSHIP CO.,
a Corporation,

Respondant.

Now, at this day, for good cause shown, It is Ordered that the respondent's time for printing the record and filing and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 22nd day of March, 1912.

CHAS. E. WOLVERTON,
Judge.

[Clerk's Certificate to Transcript]

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 37 inclusive, contain and are a true transcript of the record and proceedings had in said Court in the cause of Central Door and Lumber Company, a corporation, libelant against the California-Asiatic Steamship Company, Respondent, as the same appears of record in said Court and embraces all the proceedings with the exhibits, if any, attached, the final decree, notice of appeal, undertaking on appeal and assignments of error, together with libelants exhibits 1 to 9, inclusive.

I further certify that the cost of preparing, printing and certifying the foregoing transcript is the sum of \$-----, which has been paid by the Appellant.

In testimony whereof I have hereunto set my hand and the seal of the said Court at Portland, in said District, this 2nd day of March, 1912.

A. M. CANNON,
Clerk of the United States District Court
for the District of Oregon.

CALIFORNIA-ATLANTIC STEAMSHIP CO.



BATES & CHESEBROUGH

GENERAL AGENTS

418 MERCHANTS EXCHANGE
SAN FRANCISCO

418 MARITIME BLDG.
NEW YORK

AGENTS

PETER WRIGHT & SONS
PHILADELPHIA, PA.

A. C. BATES

HALLOA, C. Z.

A. H. CLEMENT

NEW ORLEANS, LA.

J. H. L.

from New York as follows:

CALIFORNIA-ATLANTIC STEAMSHIP CO.



F. W. CHAPMAN
TRADING MANAGER

BATES & CHESEBROUGH GENERAL AGENTS

115 MERCHANTS EXCHANGE
SAN FRANCISCO

115 MARITIME BUILDING
NEW YORK

AGENTS

PETER WRIGHT & SONS
PHILADELPHIA PA
A. G. BATES
BALTIMORE MD
A. H. CLEMENT
NEW ORLEANS LA
WHEELER & HARRIS
CHARLESTON SC

SAN FRANCISCO November 19, 1910

A. F. Biles, Esq.,
Pres. Central Lumber & Lumber Co.,
Portland, Ore.

Dear Sir:

Replying to your letter of November 9th: We have booked up considerable tonnage of iron and steel for shipment from Philadelphia on our steamer sailing December 21st for Portland and it is our intention to have a steamer make direct connection with this steamer at Panama sailing direct for Portland. We will also take freight for this connection for Portland, which is forwarded from New York on the Panama Line steamers sailing on December 16th and December 22nd. Shipments should arrive at Portland about January 25th.

For shipment on the dates mentioned we will quote you the following rates on your commodities in carload lots, minimum weight 10 tons:

Asphalt Roofing	50¢	Building Paper	50¢
Aspholining Felt	50¢	Window Glass, small sizes	65¢
Plate Glass, small sizes	90¢ per cwt.		

Shipments from Philadelphia should be routed as follows:

From New York as follows:

11/19/10.

} Messrs.
Kingsley

We would prefer to handle your shipments on our steamer sailing from Philadelphia on December 21st provided they originate in that vicinity.

It is more or less of an experiment on our part, in dispatching this direct steamer to Portland and the tonnage we receive will govern our actions in the future with respect to the handling of Portland business.

The insurance rate on shipments forwarded on this steamer will be approximately $3/4$ of 1% with average insurance.

We will be very glad to have you advise at your earliest convenience if you will make any shipments so that we can arrange to reserve space on our steamer.

Yours very truly,

J. M. Hoffman
Traffic Manager.

JWC-D

from New York
Parrot 40 tons
Guin 5 "
Dead Fish. 20 "

from Philadelphia
Ranney 50 tons
H. Blair 100 "
Plate 50 "
L. Blair. Paper

Anti Messing ✓
Aurum ✓
Ford ✓
Barber ✓
Kingsley ✓
East Roping ✓
Cheeboro - ✓
Kingsley

65
300
19500
25000
50000
35000
28500

3

[Libilants Exhibit 2]

Nov. 21, 1910

Mr. J. W. Chapman, Traffic Manager,
California-Atlantic S. S. Co.,
San Francisco, Cal.

Dear Sir:—

We have your favor of the 19th and we are arranging to give you 200 to 300 tons, of which approximately 60 tons will be shipped by steamer sailing from New York on December 16th and the balance by steamer leaving Philadelphia December 21st. Duplicate shipping receipts showing values will be sent to Bates & Chesebrough, New York. Please instruct them to insure all shipments for our account.

In addition to the goods mentioned in your quotation, our shipments will include 30 to 50 tons of heavy paints, which we are shipping with the understanding that the 50c rate will apply.

Yours truly,

CENTRAL DOOR & LUMBER COMPANY.

AFB

Filed Oct. 30, 1911,

A. M. CANNON,

Clerk U. S. District Court.

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No.

Agents No.

Charges Advanced:

\$

Agent.

Per Car Freight Charges Per

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No. _____

Agents No. _____

RECEIVED, subject to the communications and tariffs in effect on the date of issue of this Original Bill of Lading.

From _____ to _____
(contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ is in Cents per 100 Lbs.

IF 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special	IF Special
										per	per

Consigned to _____

Destination _____

Route _____

State of _____

County of _____

Car Initial _____

Car No. 109095

NO PACKAGES

DESCRIPTION OF ARTICLES AND SPECIAL MARKS

WEIGHT (Subject to Correction)

CLASS OR RATE

CHECK COLUMN

If charges are to be prepaid, write or stamp here "To be Prepaid."

650 State Glass
Lunar glass 75710

Received \$ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

The signature here acknowledges only the amount prepaid.

Charges Advanced: \$ _____

Per _____

Per _____

Agent.

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1906
 adopted 8-08.

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No. _____

Agents No. _____

RECEIVED, subject to the classifications and rates in effect on the date of issue of this Original Bill of Lading

at Grand Rapids, Mich. 1910
 from Grand Rapids, Mich. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of a lot or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ is in Cents per 100 Lbs. IF Special IF Special

IF Times 1st IF 1st Class IF 2d Class IF Rule 2d IF 3d Class IF Rule 2d IF Rule 2d IF 4th Class IF 5th Class IF 6th Class per per

Consigned to Central Lumber Co. (Mail Address—Not for purpose of Delivery)

Destination Portland State of Maine County of _____

Route Richmond, Va. Car Initial HLK 1X Car No. 165122

NO PACKAGES DESCRIPTION OF ARTICLES AND SPECIAL MARKS WEIGHT (Subject to Correction) CLASS OR RATE CHECK COLUMN

750 Plate Glass 53x50
 750 Plate Glass 53x50

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Prepaid 15
 At _____

I advise \$ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____ (The signature here acknowledges only the amount prepaid)

Charges Advanced: \$ _____

Shipped by Grand Rapids, Mich. Per Central Lumber Co. Agent, _____

CONDITIONS

$$f(x) = \frac{1}{2\pi} \int_{-\infty}^{\infty} \hat{f}(t) e^{itx} dt = \frac{1}{2\pi} \int_{-\infty}^{\infty} \hat{f}(t) e^{itx} dt = \frac{1}{2\pi} \int_{-\infty}^{\infty} \hat{f}(t) e^{itx} dt$$

Sec. 10. An water ... of Ind-
g wild! ... heron
*ler ... shall

10 90

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission, by Order No. 787 of June 27, 1915

9
Lough Valley

Railroad Company

STRAIGHT BILL OF LADING ORIGINAL NOT NEGOTIABLE.

Shipper's No.

1. This bill of lading is subject to the classification and charges in effect on the date of issue of this bill of lading. Agent's No.

Waurer, W. J.

190

FROM

Central Door & Lbr Co.,

2. The weight of the goods is as shown on this bill of lading, unless otherwise indicated. The weight of the goods is as shown on this bill of lading, unless otherwise indicated. The weight of the goods is as shown on this bill of lading, unless otherwise indicated.

3. The freight is as shown on this bill of lading, unless otherwise indicated.

IF 1st Class IF 2d Class IF Rule 25 IF 3d Class IF Rule 26 IF Rule 28 IF 4th Class IF 5th Class IF 6th Class

IF Special

IF Special

Per

Per

Consigned to Central Door & Lbr Co.,

Destination Portland, Ore.

State of

County of

Route 1st to Portland, Ore. 2nd to Portland, Ore.

Atlantic 3/4 3/4

Car Initial

Car No.

NO
PACKAGES

DESCRIPTION OF ARTICLES AND SPECIAL MARKS

WEIGHT

CLASS

CHECK
COLUMN

Subject to Correction OR RATE

If charges are to be prepaid
write or stamp here "To be
paid"

Erie 10075-1,100 Rollo Rf. Lbr
CRI&P 58410-1,100 do
1 Lx Timmings

3240
5050

Received \$

to appear in prepayment of
charges on the goods described
herein

Collect

Central Door & Lbr Co.,

100 S. P.

Aug 27 1915

Agent Per

664

67

Northern Central Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shippers No.

Agents No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at

York, Penna.

Dec. 14, 1910.

19

from Keystone Roofing Mfg. Co.

the property described below, in apparent good condition as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assign.

The Rate of Freight from York, Pa.

is in Cents per 100 Lbs										IF Special	IF Special
From	Times to	1st Class	2d Class	3d Class	4th Class	5th Class	6th Class	7th Class	8th Class	per	per
					144						

(Mail Address—Not for purposes of Delivery)

Consigned to

Central Door & Lumber Co.,

Destination, Portland

State of Ore

County of

California &

Phila., Penna.

Route P&R Atlantic S.S. Co. at Pt. Richmond

R R

Car No. 74111

NO
PACKAGES.

DESCRIPTION OF ARTICLES AND SPECIAL MARKS

WEIGHT
(Subject to Correction)CLASS OR
RATECHECK
COLUMN

If charges are to be prepaid, write or stamp here, "To be Prepaid"

600 Rolls Building Paper

15, 100

COLLECT

Received \$
to apply in prepayment of the charges on the property described hereon

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid)

Value of this shipment is \$552.50

Charges Advanced:

Keystone Roofing Mfg. Co.

Shipper.

Per

This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.

CONDITIONS

Sec 1. The carrier or party in possession of any of the herein described shall be liable for the loss thereof except as to remainder payable.

[illegible]

Sec 2 In issuing this bill of lading, this company agrees to transport only over its own line, and except as otherwise provided to deliver only as agent with respect to the portion of the route over which it is not the carrier.

[illegible]

Sec 3 No contract shall be made from any such facility so disposed of or sold by the Government, which may be subject to the provisions of the laws relating to the disposal of public property, except as hereinafter provided.

[illegible]

and property shall have full and complete effect in every case.

See 4. All projects start in subject 1 (see 2) and progress to

...and it comes out that there are a lot of things that are to be transported hereunder that have the privilege of a lower cost and risk, and compressing the same for greater economy in loading or forwarding, and that that be held responsible for deviations or unsatisfactory delays.

[illegible]

Section 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 85

...and the court made a reasonable charge for the detention of an owner of a car for use of trucks after the car has been had forty days by a warehouse, a legal holdfast, for loading or unloading, and may add such charge to all other charges herebefore and hold such property subject to a lien for it. Nothing in this section shall be construed as removing the effect of law or as affecting in any way the liability of the carrier for its cargo.

Property destined to be taken from a state or district or county of which there is to be a reapportionment shall be entirely a public one. Heretofore the courts have said that public lands belong to the people and when sold from the state are private or other sales, whether of public lands to the common stock and others or divided and sold to lots, have not been made.

Suppose $\mathcal{C} = \{C_1, \dots, C_n\}$ is a family of n convex bodies in any space E of dimension d , n_1, \dots, n_d are the numbers of C_i having dimension i and n_d is equal to 1. Let \mathcal{C} be \mathcal{C}_1 if $n_1 = 1$ and \mathcal{C}_2 if $n_1 = 2$. Let \mathcal{C} be \mathcal{C}_3 if $n_1 = 3$ and $n_2 = 1$ and \mathcal{C} be \mathcal{C}_4 if $n_1 = 4$ and $n_2 = 2$ and $n_3 = 1$. Let \mathcal{C} be \mathcal{C}_5 if $n_1 = 5$ and $n_2 = 3$ and $n_3 = 2$ and $n_4 = 1$. Let \mathcal{C} be \mathcal{C}_6 if $n_1 = 6$ and $n_2 = 4$ and $n_3 = 3$ and $n_4 = 2$ and $n_5 = 1$. Let \mathcal{C} be \mathcal{C}_7 if $n_1 = 7$ and $n_2 = 5$ and $n_3 = 4$ and $n_4 = 3$ and $n_5 = 2$ and $n_6 = 1$. Let \mathcal{C} be \mathcal{C}_8 if $n_1 = 8$ and $n_2 = 6$ and $n_3 = 5$ and $n_4 = 4$ and $n_5 = 3$ and $n_6 = 2$ and $n_7 = 1$. Let \mathcal{C} be \mathcal{C}_9 if $n_1 = 9$ and $n_2 = 7$ and $n_3 = 6$ and $n_4 = 5$ and $n_5 = 4$ and $n_6 = 3$ and $n_7 = 2$ and $n_8 = 1$. Let \mathcal{C} be \mathcal{C}_{10} if $n_1 = 10$ and $n_2 = 8$ and $n_3 = 7$ and $n_4 = 6$ and $n_5 = 5$ and $n_6 = 4$ and $n_7 = 3$ and $n_8 = 2$ and $n_9 = 1$. Let \mathcal{C} be \mathcal{C}_{11} if $n_1 = 11$ and $n_2 = 9$ and $n_3 = 8$ and $n_4 = 7$ and $n_5 = 6$ and $n_6 = 5$ and $n_7 = 4$ and $n_8 = 3$ and $n_9 = 2$ and $n_{10} = 1$. Let \mathcal{C} be \mathcal{C}_{12} if $n_1 = 12$ and $n_2 = 10$ and $n_3 = 9$ and $n_4 = 8$ and $n_5 = 7$ and $n_6 = 6$ and $n_7 = 5$ and $n_8 = 4$ and $n_9 = 3$ and $n_{10} = 2$ and $n_{11} = 1$. Let \mathcal{C} be \mathcal{C}_{13} if $n_1 = 13$ and $n_2 = 11$ and $n_3 = 10$ and $n_4 = 9$ and $n_5 = 8$ and $n_6 = 7$ and $n_7 = 6$ and $n_8 = 5$ and $n_9 = 4$ and $n_{10} = 3$ and $n_{11} = 2$ and $n_{12} = 1$. Let \mathcal{C} be \mathcal{C}_{14} if $n_1 = 14$ and $n_2 = 12$ and $n_3 = 11$ and $n_4 = 10$ and $n_5 = 9$ and $n_6 = 8$ and $n_7 = 7$ and $n_8 = 6$ and $n_9 = 5$ and $n_{10} = 4$ and $n_{11} = 3$ and $n_{12} = 2$ and $n_{13} = 1$. Let \mathcal{C} be \mathcal{C}_{15} if $n_1 = 15$ and $n_2 = 13$ and $n_3 = 12$ and $n_4 = 11$ and $n_5 = 10$ and $n_6 = 9$ and $n_7 = 8$ and $n_8 = 7$ and $n_9 = 6$ and $n_{10} = 5$ and $n_{11} = 4$ and $n_{12} = 3$ and $n_{13} = 2$ and $n_{14} = 1$. Let \mathcal{C} be \mathcal{C}_{16} if $n_1 = 16$ and $n_2 = 14$ and $n_3 = 13$ and $n_4 = 12$ and $n_5 = 11$ and $n_6 = 10$ and $n_7 = 9$ and $n_8 = 8$ and $n_9 = 7$ and $n_{10} = 6$ and $n_{11} = 5$ and $n_{12} = 4$ and $n_{13} = 3$ and $n_{14} = 2$ and $n_{15} = 1$. Let \mathcal{C} be \mathcal{C}_{17} if $n_1 = 17$ and $n_2 = 15$ and $n_3 = 14$ and $n_4 = 13$ and $n_5 = 12$ and $n_6 = 11$ and $n_7 = 10$ and $n_8 = 9$ and $n_9 = 8$ and $n_{10} = 7$ and $n_{11} = 6$ and $n_{12} = 5$ and $n_{13} = 4$ and $n_{14} = 3$ and $n_{15} = 2$ and $n_{16} = 1$. Let \mathcal{C} be \mathcal{C}_{18} if $n_1 = 18$ and $n_2 = 16$ and $n_3 = 15$ and $n_4 = 14$ and $n_5 = 13$ and $n_6 = 12$ and $n_7 = 11$ and $n_8 = 10$ and $n_9 = 9$ and $n_{10} = 8$ and $n_{11} = 7$ and $n_{12} = 6$ and $n_{13} = 5$ and $n_{14} = 4$ and $n_{15} = 3$ and $n_{16} = 2$ and $n_{17} = 1$. Let \mathcal{C} be \mathcal{C}_{19} if $n_1 = 19$ and $n_2 = 17$ and $n_3 = 16$ and $n_4 = 15$ and $n_5 = 14$ and $n_6 = 13$ and $n_7 = 12$ and $n_8 = 11$ and $n_9 = 10$ and $n_{10} = 9$ and $n_{11} = 8$ and $n_{12} = 7$ and $n_{13} = 6$ and $n_{14} = 5$ and $n_{15} = 4$ and $n_{16} = 3$ and $n_{17} = 2$ and $n_{18} = 1$. Let \mathcal{C} be \mathcal{C}_{20} if $n_1 = 20$ and $n_2 = 18$ and $n_3 = 17$ and $n_4 = 16$ and $n_5 = 15$ and $n_6 = 14$ and $n_7 = 13$ and $n_8 = 12$ and $n_9 = 11$ and $n_{10} = 10$ and $n_{11} = 9$ and $n_{12} = 8$ and $n_{13} = 7$ and $n_{14} = 6$ and $n_{15} = 5$ and $n_{16} = 4$ and $n_{17} = 3$ and $n_{18} = 2$ and $n_{19} = 1$. Let \mathcal{C} be \mathcal{C}_{21} if $n_1 = 21$ and $n_2 = 19$ and $n_3 = 18$ and $n_4 = 17$ and $n_5 = 16$ and $n_6 = 15$ and $n_7 = 14$ and $n_8 = 13$ and $n_9 = 12$ and $n_{10} = 11$ and $n_{11} = 10$ and $n_{12} = 9$ and $n_{13} = 8$ and $n_{14} = 7$ and $n_{15} = 6$ and $n_{16} = 5$ and $n_{17} = 4$ and $n_{18} = 3$ and $n_{19} = 2$ and $n_{20} = 1$. Let \mathcal{C} be \mathcal{C}_{22} if $n_1 = 22$ and $n_2 = 20$ and $n_3 = 19$ and $n_4 = 18$ and $n_5 = 17$ and $n_6 = 16$ and $n_7 = 15$ and $n_8 = 14$ and $n_9 = 13$ and $n_{10} = 12$ and $n_{11} = 11$ and $n_{12} = 10$ and $n_{13} = 9$ and $n_{14} = 8$ and $n_{15} = 7$ and $n_{16} = 6$ and $n_{17} = 5$ and $n_{18} = 4$ and $n_{19} = 3$ and $n_{20} = 2$ and $n_{21} = 1$. Let \mathcal{C} be \mathcal{C}_{23} if $n_1 = 23$ and $n_2 = 21$ and $n_3 = 20$ and $n_4 = 19$ and $n_5 = 18$ and $n_6 = 17$ and $n_7 = 16$ and $n_8 = 15$ and $n_9 = 14$ and $n_{10} = 13$ and $n_{11} = 12$ and $n_{12} = 11$ and $n_{13} = 10$ and $n_{14} = 9$ and $n_{15} = 8$ and $n_{16} = 7$ and $n_{17} = 6$ and $n_{18} = 5$ and $n_{19} = 4$ and $n_{20} = 3$ and $n_{21} = 2$ and $n_{22} = 1$. Let \mathcal{C} be \mathcal{C}_{24} if $n_1 = 24$ and $n_2 = 22$ and $n_3 = 21$ and $n_4 = 20$ and $n_5 = 19$ and $n_6 = 18$ and $n_7 = 17$

See 7. Factors partly, whether principal or agent, having no legal responsibility for the shipping expenses incurred by the carrier, are not liable to the carrier for the expenses incurred thereby, and such goods, if lost, are not subject to the risk of the carrier, and the carrier is not liable for the expenses of delivery without compensation.

See B. In owner's estimate shall pay the freight and, if the goods are found to be damaged, the owner shall pay the same. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges shall be paid upon the articles actually shipped.

[illegible]

The latter, after carrying out the purposes of its own program, is winding up its operations and is about to be absorbed by the other two. The stability of the latter is also being threatened by the economic conditions of this country.

Sec 17. In addition, add a new section to the bill of lading as set forth in the account an indorsement thereof, herein, signed by the shipper of the cargo, stating that the bill of lading, shall be without effect, and the cargo, shall be deliverable according to its order, to any

For California-Atlantic Steamship Company and Connecting Carriers.

MAYNARD J. NUMBERS

(10) Kidd

Portland

53990 lbs at : .65
7040 lbs at : .78

New York, *December 22,* 191*0* No. *R/L #2*
Received by the PANAMA RAIL ROAD COMPANY,

of John H. Masury & Sons
of the contents mentioned above, marked and numbered as per
receipt, and about equal in weight to the contents and value unknown.

Fifteen (15) Bbls	Paint
Two Hundred & Thirty two (232) Cds	"
One Hundred (100) Kegs	"
Twenty five (25) Bbls	Zinc
Seventy five (67) Cds	Varnish
Twenty two (22)	Frames
Thirty four (34) Ceases	Adm. Matter

Central Lumber & Lumber Co. Portland Ore.
Colon appointed to at Dec. 22, 1911.

In Witness Whereof, 2 Bills of Lading, all of this tenor and date, have been signed, one by the Shipper and the other to stand void.

SHIPPER IS REQUESTED TO READ THIS CONTRACT, INCLUDING CONDITIONS ON BACK.

For Panama Rail Road Company and Connecting Carriers.

For Panama Rail Road Company and Connecting Carriers.

CONDITIONS OF THIS BILL OF LADING

1. The *Chlorophyll* is a green pigment found in the chloroplasts of plants. It is responsible for the process of photosynthesis, which converts light energy into chemical energy. The *Chlorophyll* is composed of a central magnesium atom coordinated by four nitrogen atoms in a porphyrin-like ring. This structure allows it to absorb light energy efficiently.

[illegible][illegible][illegible]

It is also important to note that the above may be generalized if a system has a delay in observation and a delay in control, but at the same time, if the delay in observation is not too large, the upper bound may be extended to a larger range of delay in control, but this may be destroyed if the delay in control is too large.

[illegible][illegible]

As a result, the results of the survey are subject to the statistical errors that are inherent in the use of a sample of the population. The survey was taken with the use of a probability sampling method, which means that the sample was selected in such a way that each member of the population had an equal chance of being selected. The survey was taken with the use of a probability sampling method, which means that the sample was selected in such a way that each member of the population had an equal chance of being selected. The survey was taken with the use of a probability sampling method, which means that the sample was selected in such a way that each member of the population had an equal chance of being selected.

[illegible][illegible]

1. In case of the above-mentioned interests in the part of delivery, and without such a clause in the contract, the cargo should be considered to be the Master's responsibility in case of damage, loss or destruction, as he is to have the option of landing the goods at any port at which he may consider safe, at shippers' expense and risk, and in such a case the benefit of loss from fire or other port risks to be accepted by the owners is correspondingly reduced through an ending of the bill of lading.

Consignments of goods named in schedule of lading must comply with all the Consignments Regulations of the railway and the conditions of carriage imposed by authorities at point of destination. Consignments sent in the future in this respect in conformity with the above shall be at risk and expense of the consignees of goods and shall be paid by them.

CALIFORNIA-ATLANTIC STEAMSHIP Co.

BATES & CHESEBROUGH

GENERAL AGENTS



J. W. CHAPMAN
TRAFFIC MANAGER

418 MERCHANTS EXCHANGE
SAN FRANCISCO

408 PACIFIC ELECTRIC BLDG.
LOS ANGELES

BALEDA C. E.

410 MARITIME BLDG.
NEW YORK

411 THE DOCK
PHILADELPHIA

424 GRAVES ST.
NEW ORLEANS

3

Portland, Oregon 14th. March, 1911
~~SUNK DOCK~~

Messrs. Central Door & Lumber Co.

City.

Dear Sirs:-

I am in receipt of your claims #2252, 253, 2254, 2255, all of which have had my attention and have been forwarded to Messrs. Bates & Chesebrough in San Francisco.

Please note that our office address is 320 Lumbermen's Building as it was owing to the fact that your communication sent to my residence that it was overlooked and not sooner acknowledged.

Apologizing for the oversight,

I am

Yours very truly

Kindly send us at your convenience certified copy of each claim for our claim file.

Liberty Bell - 8

to x 3/11

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[Libilants Exhibit 9]

March 16, 1911

California-Atlantic S. S. Co.,
620 Lumbermen's Bldg.,
City.

Gentlemen:—

We have your favor of the 14th and enclose,
as requested, certified copies of original invoices covering shipments on which we have put in damage claims.

Yours truly,

CENTRAL DOOR & LUMBER COMPANY.

Enc.

AFB

Filed Oct. 30, 1911,

A. M. CANNON,

Clerk U. S. District Court.

**[Certificate of Clerk U. S. District Court to
Exhibits.]**

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

CALIFORNIA-ATLANTIC STEAMSHIP COM-
PANY, a Corporation,

Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Cor-
poration,

Appellee.

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that libelant's exhibits numbered one to nine, inclusive, and shown on pages 29 to 37, inclusive, of the Apostles on Appeal, and referred to in my certificate to the Transcript on Appeal appearing on page 28 of the Apostles on Appeal, in the above-entitled cause, are full, true and correct copies of the originals thereof, and that the said originals were offered in proof by libelant and admitted in evidence by the Court at the hearing of the above-entitled cause on the thirtieth day of October, nineteen hundred and eleven.

A. M. CANNON,
Clerk of the United States District Court for the
District of Oregon.

[Endorsed]: No. 2116. In the United States Circuit Court of Appeals, for the Ninth Circuit. California-Atlantic Steamship Company, a Corporation, Appellant, vs. Central Door & Lumber Co., Appellee. Additional Certificate of Clerk. Filed May 20, 1912. F. D. Monckton, Clerk.

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IN THE
United States
Circuit Court of Appeals
NINTH DISTRICT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,
A CORPORATION,
Appellant,

vs.

CENTRAL DOOR AND LUMBER COMPANY,
A CORPORATION,
Appellee.

BRIEF OF APPELLANT

**Upon Appeal from the United States District Court
for the District of Oregon**

STATEMENT.

On July 5, 1911, the Appellee filed in the District Court a libel against the Appellant and attached the Steamship "STANLEY DOLLAR," the property of Appellant, seeking compensation for injuries and damage to a certain consignment of goods and wares shipped under contracts of affreightment with Appellant.

The libel alleges that these goods and wares were shipped in good condition by libelant on board the Steamship "MILLS," then lying in the Port of Philadelphia and then bound to the Isthmus of Panama, to be transported in said steamer **and connecting lines** and steamers to Portland, Oregon. It is further alleged that after delivery of these goods and wares at Portland, Oregon, it was discovered they were damaged and injured, all owing to the alleged negligence of respondent in stowing and handling the same.

It appears from the face of the libel and from the testimony received in evidence that the goods in question were shipped to be transported partly by navigable waters and partly by land. Some of the goods originated at Toledo, Ohio; some, at York, Pennsylvania, and the rest at Philadelphia. Those originating elsewhere than Philadelphia were shipped by railroad to Philadelphia; the entire consignment was then loaded on board the steamship "Mills" and was transported to Colon, Panama, and there unloaded from the "Mills" and stowed and loaded upon cars of the Panama Railroad Company and carried across the Isthmus of Panama to Balboa on land by railroad; and then loaded upon the steamship "Stanley Dollar" and transported thence to Portland, Oregon.

There is no allegation in the libel to the effect that the goods were damaged and injured while on board either the "Mills" or the "Stanley Dollar" and they

may have been and very likely were damaged and injured while crossing the Isthmus on land.

The facts relative to the respondent's defense to this libel necessarily were to be procured from Philadelphia, Colon and Balboa, and would require some time to obtain. The respondent appeared, filed a stipulation and bond and released the attached property and procured from libelant's attorney a stipulation for time in which to answer. About the time of the expiration of this stipulation counsel for respondent met counsel for libelant and explained that he needed further time because he had not yet received the facts necessary to frame an answer and counsel for libelant informed respondent's counsel that no default would be taken without prior notice. Relying upon this assurance counsel for respondent filed no dilatory plea and did not apply to the Court for further time. Without notice of any kind counsel for libelant on October 27, 1911, appeared before the Court and took a default against respondent and on October 30, 1911, without notice to respondent and during its absence, offered proof, and a decree was then entered. This action was not discovered by respondent until a day or so later and a motion was made, supported by affidavits, for the setting aside of the default. The District Judge held, however, that by rule of Court stipulations of counsel would be disregarded unless in writing, and refused to set aside the default, and thus libelant has procured an advantage it should not have. Respondent has a good and meritorious de-

fense which it intended and desired to interpose, but, on account of the actions aforesaid, respondent is reduced to presenting this matter on appeal upon an exception to the jurisdiction of the District Court in admiralty.

We have made the foregoing explanation so that this Court may understand that it was not for want of a meritorious defense that the default was entered and that respondent is here now challenging the jurisdiction of the Court. Respondent wants an opportunity to present its defense upon the merits and, if it can compel libellant to amend its libel, that result can be accomplished.

Upon the record as it stands appellant contends that the Admiralty Court has no jurisdiction because it does not appear from the libel that the alleged negligence or breach of contract or resulting damage to the goods occurred on navigable waters and did not occur on land while crossing the Isthmus of Panama and it does appear that so much of the contract of affreightment which was to be performed in crossing the Isthmus of Panama was to be performed by "connecting lines" and is not a maritime contract.

The respondent has assigned and does assign as errors committed by the Court and apparent on the face of the record, the following, to-wit:

I.

The District Court sitting in admiralty erred in as-

suming jurisdiction over and rendering a decree upon a bill of lading providing for a carriage both by navigable waters from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, and issued upon a single freight consideration for the through carriage from Philadelphia, Pennsylvania, to Portland, Oregon.

II.

The said Court erred in rendering a decree for injuries and damage to and loss of the liquid white paint sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said liquid white paint was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said liquid white paint was injured on navigable water and part on land, what portion thereof was injured on navigable water.

III.

The said Court erred in rendering a decree for injuries and damage to and loss of the plate glass sued for on a carriage by navigable water from Philadelphia,

Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said plate glass was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said plate glass was injured on navigable water and part on land, what portion thereof was injured on navigable water.

IV.

The said Court erred in rendering a decree for injuries and damage to and loss of the sheepskin sheathing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said sheepskin sheathing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said sheepskin sheathing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

V.

The said Court erred in rendering a decree for injuries and damage to and loss of the Atlas insulating paper sued for on a carriage by navigable water from

Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Atlas insulating paper was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Atlas insulating paper was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VI.

The said Court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Genasco roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Genasco roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Genasco roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VII.

The said Court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing

known as Phoenix roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Phoenix roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Phoenix roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VIII.

The said Court erred in denying the application of the respondent for an order vacating and setting aside the default decree entered herein, and thereby refusing to permit and allow the respondent to make a defense on the merits.

IX.

The said Court erred in assuming jurisdiction of this cause, because it is not within the admiralty and maritime or other jurisdiction of said Court. It appears in the libel filed in said cause that the contract for the carriage of the goods mentioned in said libel was not a contract of affreightment by navigable water, but was a contract to carry said goods from Philadelphia, Pennsylvania, to Portland, Oregon, made upon a single freight consideration, and contemplated carriage both by navigable water and by land. It is not alleged in

said libel that said contract was made upon navigable water; nor is it alleged in said libel that the injuries to the goods for which damages are asked occurred while said goods were on shipboard or on navigable water; nor was any proof offered to show that said contract was made upon navigable water or that said injuries were done on shipboard or on navigable water.

X.

The libel in the above entitled cause wholly fails to state facts sufficient to constitute a cause cognizable in the above entitled court sitting in admiralty and said Court erred in assuming jurisdiction of said cause.

XI.

Said Court erred in rendering any decree in said cause other than a decree dismissing the libel.

XII.

Said Court erred in not rendering a decree dismissing the libel herein.

POINTS AND AUTHORITIES.

I.

The libel is founded upon tort and not on breach of contract.

The Quickstep, 9 Wall, 670.

Nelson v. Great Northern R. R., 72 Pac., 642.

Parrill v. Cleveland Co., 55 N. E., 1026.

Whittington v. Memphis Co., 21 Fed., 896.

The John G. Stevens, 18 Sup. Ct. Rep., 549.

II.

Admiralty will not take jurisdiction of an action to recover damages for a tort unless it appears from the libel that the damage, resulting from the wrong or negligence complained of, occurred on navigable water and not on land.

The Plymouth, 3 Wall, 20.

The Rock Island Bridge, 6 Wall, 213.

The Steamboat Commerce, 1 Black, 574.

The Belfast, 7 Wall, 624.

The Steamboat New World, 16 How. 469.

Johnson v. Chicago Co., 119 U. S., 397.

Ex Parte Phenix Co., 118 U. S. 610.

The Mary Garrett, 63 Fed. 101.

The Mary Stewart, 10 Fed. 137.

Hermann v. Port Blakely Co., 69 Fed., 646.

III.

Admiralty will not take jurisdiction of a contract of affreightment, which is to be performed partly on land and partly on water, unless it appears that the damage or loss, for which recovery is sought, occurred during the performance of that part of the contract which was to be performed on the water.

Pacific Coast S. S. Co. v. Ferguson, 76 Fed. 993.

Pacific Coast S. S. Co. v. Moore, 70 Fed. 870.

The Richard Winslow, 67 Fed. 259, affirmed in 71 Fed. 426.

Phoenix Insurance Co. v. Erie Co., Fed. Cas. 11112.

Jones v. Massachusetts, Fed. Cas. 7480.

The Pennsylvania, 154 Fed. 9.

The Pulaski, 33 Fed. 383.

The James T. Furber, 157 Fed. 126.

Turner v. Beacham, Fed. Cas. 14252.

IV.

Facts necessary to sustain admiralty jurisdiction must appear in the libel, the Court cannot presume them.

Peyroux v. Howard, 7 Pet. 341.

V.

Admiralty jurisdiction cannot be acquired by consent or waiver, but only by the necessary jurisdictional facts appearing in the libel.

The Oceano, 148 Fed. 131.

VI.

A contract or agreement to **procure** insurance in a shipment of goods by sea is not a maritime contract and not cognizable in admiralty.

Marquard v. French, 53 Fed. 603.

The City of Clarksville, 94 Fed. 201.

VII.

A bill of lading contains a contract binding upon the consignor and consignee as well as the carrier.

The Henry B. Hyde, 82 Fed. 681.

ARGUMENT.

Our attack on the jurisdiction of the Court is based upon the absence from the libel of any allegation as to where the negligence and resulting damage to the goods occurred. Our proposition, briefly stated, is that it must appear from the libel that the damage to the goods occurred during that part of the transportation which took place upon navigable water, and this is true whether the form of the suit is *ex contractu* or in tort. If it is based upon tort, then it is the location of the happening of the resulting damages on navigable waters that gives admiralty jurisdiction of the tort. If it is based upon breach of contract, it must appear that the contract breached was a maritime contract, before admiralty will take jurisdiction. For all the libel shows the acts of negligence complained of and the resulting damages may have occurred on the land during that part of the transportation which was on the railroad across the Isthmus of Panama. And we shall assume that it did occur there, because the libel fails to allege that it occurred on navigable waters.

We contend that this is fatal to admiralty jurisdiction, because admiralty has no jurisdiction of a tort occurring on the land, and a contract of transportation to be performed on the land is not maritime in its nature and a breach of that part of the contract of affreightment, which was to be performed on the Isthmus of Panama is not cognizable in admiralty.

In discussing the propositions we have made we

shall first consider the libel as founded in tort and give our views as to why it should be so considered; and then consider the matter from the viewpoint that the libel is based upon a breach of contract.

This suit is based upon tort, and admiralty has no jurisdiction of it.

In this class of cases it is difficult sometimes to determine whether the recovery sought is for tort or breach of contract. The same acts may be breach of contract and tort at the same time. In a contract of affreightment is implied the duty of safely carrying the goods shipped. By virtue of the character of respondent as a common carrier the law imposes upon it the same duty of safe carriage. So that any act of negligence on the part of respondent whereby the goods are injured during the carriage is at once a breach of the contract and at the same time a violation of the duty imposed by law, i. e., a tort.

The libelant here had the right to bring its suit upon either theory; for a breach of the contract, or for violation of the legal duty. And which theory it has elected to pursue must be determined from the libel and the special circumstances of the case.

It appears that there were special contracts entered into in this case evidenced by the bills of lading offered in testimony at the hearing. And it appears from these

special contracts that the liability of respondent was limited in several material particulars. In the first place there is no liability upon respondent for breakage, for leakage, or for the effects of heat; nor is there any liability unless a written demand for damages be served upon respondent within ten days of the delivery of the shipment; nor is there any liability upon respondent for damages occurring while the goods were in the custody of connecting carriers. These provisions are contained in the contracts,—the bills of lading,—made a part of the case by libelant's proof at the hearing, and we refer to them here in order to show that libelant has not undertaken to declare upon them. There is no allegation of their existence or of compliance with their terms by libelant. Furthermore it appears there could be no recovery upon the special contracts because the libel shows that the injuries to the goods are of the very character which are exempted by the special contracts, i. e., breakage, leakage and the effects of heat. Neither does the libel undertake to declare upon an implied contract of carriage arising from the payment of consideration and promise to perform for the reason that no promise is alleged and in fact an express contract is averred. The libel alleges in paragraph third that the shipment was made pursuant to arrangements previously made with respondent. These arrangements, while not specifically alleged, appear from the testimony to be those contained in the bills of lading. No allegation is made

that libelant has performed the conditions of those arrangements on its part to be performed.

Whatever express contract may have been made, however, no matter what its terms may be, cannot exempt or discharge respondent from liability for its violation of the duty imposed upon it by law by virtue of its character as a common carrier; that is to say, respondent cannot contract away its liability for tort—for negligence. And a declaration ignoring the contract and failing to allege the usual facts of consideration and promise and performance of conditions precedent is usually considered to be based upon the tort involved, notwithstanding the contract is referred to as matter of inducement tending to show the relation of carrier and shipper.

The Quickstep, 9 Wall. 670.

The libel affirmatively bases the libelant's claim upon the alleged negligence of respondent and does not base the same either upon the special contract nor upon implied contract. (Nelson v. Great Northern Ry. Co., 72 Pac. 642; Parrill v. Cleveland Co., 55 N. E. 1026.)

Referring to this subject, Justice Hammond, in the case of Whittenton Mfg. Co. v. Memphis Co., 21 Fed. 896, 901, 902, says:

“While they (the authorities) leave the matter still in doubt, and evidently, as Mr. Schouler says, indicate a desire to narrow the plaintiff's election if possible, they come at last to the rule already indicated in the decision I have cited

from the Supreme Court of the United States (New Jersey Co. v. Bank, 6 How. 344, 381) in determining the admiralty and suggested by Mr. Hutchinson, **that the innate and habitual** form of action on the ordinary contract for carriage, for a breach of duty to keep the goods safely, without loss by negligence, is 'founded in tort,' and the declaration will be so construed unless the special features of the case show it to have been 'founded in contract.' "

The special features of this case indicate that libelant has followed this "innate and habitual form of action" in tort and further indicate that the contract has been ignored and its provisions not relied upon.

At this point we shall assume that the basis of recovery sought by libelant is the tort alleged in the libel, i. e., the alleged acts of negligence as distinguished from breach of contract. In view of the fact that these alleged acts of negligence and the resulting damages to the goods occurred on land while crossing the Isthmus of Panama, the tort is not a maritime tort and admiralty will not take cognizance of it. We have cited a number of decisions in our **Points and Authorities No. II** on this proposition (one of them, *Herman v. Port Blakely Co.*, 69 Fed. 646 being by this Court), which are so apt and in point that further argument is waste of time and energy. In order that this Court retain jurisdiction it will be necessary for it to indulge in the presumption that the tort and damages occurred on navigable water. The Court cannot presume the facts necessary to its

jurisdiction; they must affirmatively appear. (7 Pet. 341.). The libel shows on its face and the proof demonstrates that the carriage involved was performed partly on navigable water and partly on land crossing the Isthmus of Panama, and there is no allegation, presumption, or inference that the tort or damage occurred during the voyage on navigable water and not while crossing the Isthmus of Panama. There are certainly not sufficient facts alleged to give the Court jurisdiction on the theory that the recovery is for a tort.

There is no jurisdiction of a breach of contract.

In stating a cause of suit for breach of contract, to give admiralty jurisdiction, the libel must go further than if the case were tort, and show not only that the damage occurred during the performance of that part of the contract which was to be performed on navigable waters, but must also show that the contract sued on is a maritime contract.

Courts of admiralty take jurisdiction of only such contracts of affreightment as are maritime. A contract to be performed upon land, therefore, is not within the jurisdiction.

The libel alleges that the goods were delivered aboard the steamer "Mills," then bound for the Isthmus of Panama, and that the goods were to be transported to Portland, Oregon. Whether or not the goods were to

be transported by sea on the "Mills" and "Stanley Dollar" is not alleged. The contract of carriage, in so far as it is alleged in the libel could have been performed by carriage across the continent on railways; nor, indeed, is there any allegation that the "Mills" ever sailed or that the carriage was not made by rail to San Francisco and thence by "Stanley Dollar" to Portland, or that it was not made entirely by rail from Philadelphia to Portland, except by inference. Whether the contract was to be performed on the seas or on land does not appear in the libel, nor does it appear how it was performed.

It is true that the libel alleges in paragraph third that the goods were shipped on board the steamship "Mills," "then lying in the Port of Philadelphia and then bound to the Isthmus of Panama, to be transported in said steamer **and connecting lines** and steamers to Portland, Oregon," yet this does not give any information as to how much of the carriage was agreed to be performed by connecting railway lines. Nor does the allegation in paragraph fourth of the libel "that respondent at Portland, Oregon, notified libelant that said goods and merchandise had arrived by its steamship 'Stanley Dollar'" amount to an allegation that they had so arrived.

By examination of the proof adduced at the hearing, however, it is disclosed from the bills of lading that the carriage was to be performed as follows: By steamship "Mills" to Colon, Panama; by railway on land

across the Isthmus of Panama to Balboa; by steamship "Stanley Dollar" from Balboa to Portland, Oregon, and that the goods were so carried.

We have then, before the court, a mixed contract calling for substantial performance both upon navigable water and upon land. The transportation across the Isthmus was as substantial and important as the transportation by sea to and from the Isthmus, for without it the transportation by sea would be useless. Of the contract for the carriage by sea and of all matters of performance thereof to be done on the sea admiralty has jurisdiction. But of that part of the contract requiring performance by carriage on land across the Isthmus of Panama we cannot perceive any jurisdiction whatsoever. It further appears that the Panama Railway Company was a party to these contracts of affreightment by virtue of being a connecting carrier across the Isthmus and that the special contracts provide that each carrier shall be liable alone for damage occurring to the goods while they were upon that carrier's particular part of the voyage.

The contracts were made by respondent and by the railways for the benefit and on behalf of all connecting carriers, so that, as a matter of fact, there are separate contracts for this through transportation. A contract with respondent for the carriage with the Lake Shore & Michigan Southern Ry. Co. for the carriage over its line of railroads; a contract with the Lehigh Valley Railroad Co. for the carriage over its line of railroad, and a

contract with the Panama Railroad Co. for the carriage over its line of railroad. (See Fed. cases 11112.)

Of the contract to be performed by these railroad companies on the land admiralty will not take jurisdiction, because they are not maritime. Or, to put it another way, admiralty will not take jurisdiction of that part of the contract which is to be performed exclusively on the land.

Justice Clifford, in *The Belfast*, 7 Wall. 624, says:

“Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts. * * *

(1) Contracts, claims or service purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in admiralty. (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime any more than those made to be performed on the land.”

“The general result to which my inquiry into this subject has brought me,” says Hopkinson, J., in *Thackeray v. The American Boat Farmer*, Fed. Cas. No. 13852, “is, that as to torts, injuries, and offenses, locality gives jurisdiction; but as to contracts, there must be something more. It is not enough that the service performed or to be per-

formed is on the high sea or on tide water; it must in its subject matter be maritime."

Is the contract alleged in the libel or shown by the testimony maritime in its nature, in so far as it affects the carriage by railroad across the Isthmus of Panama?

The libel fails to state where the alleged breach of contract, the alleged acts of negligence and the alleged resulting damages occurred, and we have therefore assumed that they occurred during the passage of the Isthmus of Panama.

A single contract may require several performances for a single consideration, such as (1) the transportation of goods from Chicago to Buffalo, by navigable water; and, (2) the storage of them at Buffalo. The storage of the goods is not a maritime contract, but the transportation of them is. Admiralty will enforce that part of the contract referring to the transportation of the goods, but will refuse to take cognizance of that part referring to the storage.

The *Richard Winslow*, 67 Fed. 259, affirmed 71 Fed. 426.

In the case just cited the damage to the cargo for which the libel was brought occurred during the performance of that part of the contract which was not maritime, i. e., the storage, just as the damages in this case occurred during the performance of that part of the contract which calls for transportation across the Isthmus. The carriage across the Isthmus is not mari-

time any more than the storage was and admiralty has no cognizance of it any more than it had in the case of the storage. In that case the damage to the cargo was a breach of contract, it is true, but it was not a breach of that part of the contract which was maritime.

This Court has decided the proposition, it seems to us, in the case of *Pacific Coast S. S. Co. v. Ferguson*, 76 Fed. 993, where it was claimed there was an entire contract for the transportation by navigable water from Moss Landing to San Diego of a shipment of barley and also payment of the railroad charges for the carriage of the barley on the railroad from Blanco to Moss Landing. A libel was filed to recover the amount of the railroad charges and it was claimed admiralty had no jurisdiction. The Court, however, held that that part of the contract which had to do with the carriage of the grain on land from Blanco to San Diego and the payment of the charges therefor was not maritime in its nature and not within the admiralty jurisdiction. In the course of his opinion, Circuit Judge Gilbert said:

"It (referring to libellant) is in precisely the attitude it would occupy if the grain had been at Blanco, instead of at Moss Landing, when the contract was made, and it had undertaken to carry the same to San Diego at \$1.00 for the carriage by land and \$3.10 for that by water. The contract, as far as it pertained to the transportation, was purely a maritime contract, and enforceable in the admiralty. So far as it pertained to the railroad charges, it was not maritime; and the

admiralty court is without jurisdiction to entertain it."

As we have said, the negligence, the breach of contract and the resulting damage all occurred during the passage on land across the Isthmus of Panama. This transportation is not a maritime service and admiralty has no more to do with a contract for the same than it had to do with a contract to haul barley from Blanco to Moss Landing in the case just cited.

We shall refer to but one other case illustrating our contention and, while it sustains the jurisdiction, it is very much in point, because the jurisdiction is there sustained on account of a showing that the injury and damage occurred during the performance of that part of the contract which was to be done on the water. We refer to the case of *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, Fed. Cas. 11112, where a contract was made to transport grain by water from Chicago to Erie, thence by railroad to certain inland points. The loss occurred during the voyage by water from Chicago to Erie and objection was made to the jurisdiction because it was an entire contract for transportation from Chicago to the inland points, to be partly performed on the water and partly on the land. The Court held that if the loss or damage occurred during a performance of that part of the contract to be done on the water admiralty had jurisdiction; if it occurred during the transportation on land admiralty had no jurisdiction; it appeared that the loss occurred on the water, and the Court, for that reason, sustained the jurisdiction.

We shall repeat that there is nothing in the libel nor in the proofs indicating where the negligence or the damage occurred in this case. But it does appear from the libel and from the proof that the carriage of these goods was to have been and was made both by sea and by land. Inasmuch as the loss and damage occurred during the carriage by land, this Court has no jurisdiction either in tort or ex contractu. In order that the jurisdiction should appear it was necessary that the libel should allege that the damage occurred to the shipment while on board either or both the steamships involved and during the voyage at sea.

This disposes of the case as we see it.

The libel alleges that respondent agreed to insure the shipment, but neglected to do so. Such a contract, to **procure** insurance, it is well settled, is not cognizable in admiralty.

Marquardt v. French, 53 Fed. 603.

The City of Clarksville, 94 Fed. 201.

We respectfully submit that the decree of the District Court should be reversed and the libel dismissed for want of jurisdiction, or be remanded to the District Court, with instructions that libelant amend its libel and respondent be permitted to answer thereto.

Respectfully submitted,

WILLIAM DENMAN,

MALARKEY, SEABROOK & STOTT,

Proctors for Appellant.

No. 2133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY

(a corporation),

Appellant,

VS.

CENTRAL DOOR & LUMBER COMPANY

(a corporation),

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Statement of Case.

This appeal is from a decree based upon a default taken against respondent for failure to except or answer to the libel. With the reasons for the default we are not familiar, nor are we here concerned, as they have been more fully dealt with in the brief of appellant's Portland counsel heretofore filed.

According to the record, no verbal testimony was given at the hearing, but the decree was based on the libel and certain letters of the respondent and the

bills of lading for the goods alleged to have been damaged.

The libel sets forth that the respondent is a common carrier and that "on or about the month of December, 1910, pursuant to arrangement theretofore made with respondent, libelant shipped and caused to be shipped in good order and condition, on board the steamship 'Mills', then lying in the port of Philadelphia, and then bound to the Isthmus of Panama, to be transported in said steamer and connecting lines and steamers to Portland, Oregon, * * *" *certain goods.*

There is no allegation of a promise or agreement to carry the goods, and there is nothing to show what was the "arrangement" referred to at the beginning of article 3 of the libel (apostles, page 4). The "arrangement" may have been to accept the goods as a common carrier and thereafter be subject to the obligations of that *status*, for a violation of which obligation it would be liable in *tort*, or it may have been a straight promise to carry safely to Portland, for a violation of which it would be liable in *contract*. We find on looking elsewhere in the libel that the libelant nowhere relies on contract but repeatedly places its cause of action on negligence.

In article 5 (page 5), the damage, which is particularly described, is alleged to be "all owing to the negligence of respondent in stowing and handling the merchandise". In article 6 (page 6), is set forth the pecuniary amount of the damage to the cargo "shipped by libelant and destroyed by the negligence of re-

“spondent as aforesaid”. In article 7 (page 6), it is alleged that libelant’s loss “was occasioned solely by the “negligence and misconduct of the respondent, its employees, agents, or servants in the following particulars”, describing various acts of negligence in stowing, handling, etc., in detail. In article 8, the loss is described as a “total loss by the negligence of respondent”. It is thus clear that the libel is based on negligence and not breach of contract.

However, the question of the character of the suit is finally disposed of by the District Court in its decree, where it finds “that the libelant has sustained damages “by reason of the *negligence* of the respondent in the “sum of \$7288.42”.

The locus of the tort is nowhere set forth in the libel. The “connecting line” referred to in article 3 is undoubtedly the railroad across the Isthmus of Panama, a carriage through the tropics. Did the alleged negligence in stowing occur when the agents of the libelant placed the merchandise on cars of that road? Did the alleged negligence consist in stowing the building paper in open cars with the risk of tropical rainstorms? Was the glass broken when being taken from the train at its destination? Was the asphalt roofing improperly piled in a tropical sun, or otherwise exposed to heat when placed in the railroad yards at Colon? The libel nowhere states anything concerning the place in which any of the various acts of negligence so specifically set forth in detail, actually occurred. There is nothing whatsoever in the phraseology which

connotes or suggests that the acts of handling, stowage or carriage occurred on shipboard as distinguished from these acts where the carriage is by land in railway freight cars. The decree, following the libel, makes no finding as to the locus of the tort.

In connection with the railroad haul over the Isthmus the court will no doubt take judicial notice that it does not exceed a distance of fifty miles. As far as mere length of haul is concerned, this is of course a small fraction of the whole journey, but it must be remembered that it involves exactly as much "handling" and "stowage" as the voyages in either of the steamships. All the goods must be placed in cars, stowed there and handled out of them. Furthermore, the court will take notice of the fact that stowage in the comparatively smaller space of the freight car is much more difficult than in the wide and capacious area of a ship's hold.

When we come to the carriage itself the exposure to heat of a freight car in a tropical sun is much greater than that of a steamer with its cargo holds below the water line. Then there is the bumping and jostling of the cars, causing breaking strains on the goods which they would not experience on a steamship. Besides there is the likelihood of the use of open cars exposing the goods to rain.

The record and the judicial knowledge of the court as to the conditions necessarily encountered on a voyage from Philadelphia to the Isthmus of Panama by sea across to the Pacific by rail and thereon to Portland, Oregon, by sea clearly establishes that the

portion of the journey by rail is at least equal in danger as far as stowage and handling is concerned to either stage of the journey by sea, and while not as long presents a considerable period of exposure to heat, breakage and rain far likelier of damage than while the goods are in the hold of a vessel.

That is to say the land haul, in so far as it may have been the locus of the negligence and tort complained of in the libel, is a very important portion of the total carriage and cannot be regarded as a mere maritime incident in a long sea journey.

The libel also relies on an alleged agreement to procure insurance on the goods, the alleged acceptance of premiums for such insurance and the breach of the contract to procure the insurance (Arts. Third, Fourth and Seventh, apostles, pages 4, 5 and 7). The damages are alleged to be set forth in Schedule A and to amount "to the sum of \$6,988.81 as aforesaid including the *insurance* and other charges paid to respondent". Nowhere in the libel or in the schedule is the amount claimed for insurance charges segregated from the alleged damages from negligent handling and stowage. That is to say even admitting the alleged negligence in handling the cargo was a maritime *tort*, the damages claimed are so mingled with damages in an unliquidated amount for the breach of a *non-maritime* contract to procure insurance, that the maritime portion cannot be segregated from the other.

It is true that there is a finding in the decree that the libellant sustained damages by reason of the *negligence*

of the respondent in the sum of \$7,288.42 but this is not justified by allegations of a libel which do not set forth any specific sum as damages for negligence, but merely describe a lump sum including both damages for negligence and damages for breach of a non-maritime contract.

The libel alleges in article six (page 6) that the value of the goods destroyed by the negligence of respondent “*at the City of Portland on the 22nd day of February, 1911, the date of arrival of said merchandise was \$6988.81*” and in article eight (page 7) that the schedule annexed sets forth the “market value of the goods * * * amounting to the sum of \$6988.81 *as aforesaid*”, that is to say at Portland on arrival. The schedule itself follows out this allegation and is cast in the form of a sold note for the goods by the libelant to the respondent at *Portland* (apostles, page 10).

At the trial the libelant introduced seven bills of lading, in the first four of which it appears that the shipper and carrier agreed that “the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price if any to the consignee including the freight charges if prepaid) at the place and *time of shipment* under the bill of lading”. Exs. 3 (both bills) ~~pages~~ 4 and 5 (section 3 of endorsement on each). In the next three bills a similar agreement is made in the following words: “All liability under this bill of lading shall be esti-

“mated on the basis of the actual market value of the goods *at the place and time of shipment*” (section 4 of endorsement).

There is no allegation in the libel nor any evidence in the record that the market value of the goods *at Portland* is the same as at the point of their shipment. There is therefore nothing in the record to sustain the finding that the damages amounted to \$7288.42 (page 15) or any relevant evidence or admission by default whatsoever on the question of damages.

The libel alleged a damage of \$6988.81 based on a valuation at Portland which we have shown is irrelevant under the stipulation in the bill of lading. However even if it were relevant, respondent's default admitted only this amount. The decree after default allows an amendment to the libel increasing the claim of damages for negligence to \$7288.42 and the decree for that amount and interest.

We will endeavor in this brief to show:

1. That the libel and record fail to show the locus of the tort claimed and that the court sitting in admiralty had no jurisdiction to award damages for the negligence upon which the action is in part based.

2. That, even if the suit had sounded in contract for a carriage from Philadelphia down the Atlantic to the Isthmus of Panama, across the Isthmus to the Pacific and thence to Portland, there is no allegation that there was a breach of the agreement for that portion of the carriage which was on the sea, and hence no jurisdiction laid in admiralty.

3. That the decree should have dismissed the libel because, if it is founded at all on a maritime tort, the damages claimed for that tort are so interwoven with damages claimed for breach of a non-maritime contract to procure insurance, over which it has no jurisdiction, that the two could not be segregated.

4. That the decree should have dismissed the libel, it appearing from the bills of lading that the damages for injury to cargo were to be computed on the values at the point of shipment, and there being no allegations in the complaint or proof at the hearing of such value.

5. That the court had no jurisdiction over the person of the respondent to amend the libel after default to a greater amount than that originally set forth, nor to render a decree for such greater amount.

I.

The libel and record fail to show the locus of the tort claimed and the court sitting in admiralty had no jurisdiction to award damages for the negligence upon which the action is in part based.

It is an elementary principle in the law of federal procedure that the facts conferring jurisdiction on the court must affirmatively appear in the pleadings and, while a failure to state the facts does not make a decree void and subject to collateral attack, nevertheless, on appeal it will be reversed for that cause. As was said by Mr. Justice Washington in the leading case on this subject:

“They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause.”

McCormick v. Sullivant, 10 Wheat. 192 at 199;

Metcalf v. Watertown, 128 U. S. 586;

Fishback v. Western Union Tel. Co., 161 U. S. 96, at 100.

In *Cervantes v. The United States*, 16 Howard 619, the Supreme Court reversed the decree of the District Court because it did not affirmatively appear in the record that the land in dispute was situated in the Northern District of California.

In the "Confiscation Cases", where the libel was brought in the admiralty side of the court, the Supreme Court lays down the rule for the District Court, saying,

"though not an inferior court, the district court is one of limited jurisdiction and that it has jurisdiction of the particular case which it attempts to adjudicate must always appear."

Confiscation Cases, 20 Wall. 92-107;

People v. Steamer America, 34 Cal. 676.

As was stated by Mr. Justice Harlan in a case in this circuit, referring to the jurisdictional averments,

"they possess no powers except such as the constitution and the acts of congress concur in conferring on them and the *legal presumption* is that every cause is without their jurisdiction unless the contrary affirmatively appears."

United States v. Southern Pacific Co., 49 Fed. 299, 300.

In a very early case the Supreme Court laid down the same rule as controlling *in admiralty*.

"The want of jurisdiction in the District Court is not put on the ground set up in the plea in the court below, that all the parties were citizens of the same state. This has been very properly abandoned here, as entirely inapplicable to admiralty proceedings in the District Court. But it is said that it does not appear upon the face of the proceedings that the cause of action properly belonged to admiralty jurisdiction. There can be no doubt that it must appear from the pro-

ceedings that the court had jurisdiction of the case.”

Sylvan Peyroux v. Howard et al., 7 Peters 324, at 341.

The mere general averment in article X of the libel, that the acts were within the jurisdiction of the court is not a substitute for the showing of facts which in themselves confer the jurisdiction. As was said by the Supreme Court:

“The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. *Ex parte Smith*, 94 U. S. 455 (24:165); *Metcalf v. Watertown*, 128 U. S. 586 (32:543). The general averment in this bill that ‘the amount or value in controversy in this suit exceeds the sum of \$2000, exclusive of interest and costs’ was a mere conclusion and that it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach \$2000.”

Fishback v. Western Union Tel. Co., 161 U. S. 96, at 100.

Chief Justice Marshall states the proposition in the following words:

“The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration *shall state expressly the fact on which*

jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments."

Brown v. Keene, 8 Pet. 115;

Robertson v. Vease, 97 U. S. 646 at 649.

That the jurisdiction of a court of admiralty for libels in tort is limited to those torts committed on the high seas and navigable waters is elementary.

Ex parte Phoenix Insurance Co., 118 U. S. 610;

Johnson v. Chicago & P. Elevator Co., 119 U. S. 388;

The Plymouth, 3 Wallace 20.

In our opening statement of fact we have shown that the libellant clearly relies on tort for his recovery and that the court in finding damages for negligence and not breach of contract and making its decree on that finding accepts its contention. The authorities clearly sustain the contention that the suit is not in contract.

In *The Quickstep*, 9 Wallace 665 (19 L. Ed. 767), the libel was filed by the owners of a canal boat, to recover for injuries to the boat and loss of a cargo he was carrying, in consequence of the alleged negligence of the respondent's tug. The libel set out a contract to tow, a deviation from the course stipulated in the contract, and the injury caused by the negligence of the tugboat. The respondent claimed that this was an action in contract but the court held that it was laid in tort, Davis J. in rendering the opinion of the court saying:

"The libel was not to recover damages but the breach of a contract, as is contended, but to ob-

tain a compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

9 Wallace 665.

In *Whittendon Co. v. Memphis Packet Co.*, the court says:

"That the innate and habitual form of action on the ordinary contract for carriage, for a breach of duty to keep the goods safely without loss by negligence, is 'founded in tort' and the declaration *will be so construed unless the special feature of the case show it to have been founded in contract.*"

21 Fed. 896, at 902.

See also

Nelson v. Gt. Northern Ry. Co., 12 Pac. 642 (28 Mont. 297);

Bowers v. Ry., 107 N. C. 721, 12 S. E. 454;

Rideout v. Ry., 71 Wis. 237, 51 N. W. 437;

Moore v. Carriers, 1330.

The tendency of the courts to hold the action as one arising out of tort is illustrated by *Ry. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727, where it was held that if the language of the petition is equivocal, and there is doubt as to whether an action on contract or in tort was intended, it is to be resolved by construing it as an action in tort, rather than as an action for breach of contract.

We have heretofore shown in our opening statement that nowhere in this proceeding has there been either allegation or proof as to where the alleged negligence by which the goods were injured took place. It is a necessary jurisdictional averment that it took place on navigable water. For all that appears it may have well taken place on the Isthmus of Panama. According to Mr. Justice Harlan's statement of the rule it will be *presumed* that it took place there and that the court had not jurisdiction rather than that it was received while on one of the steamships.

We do not have to go as far as to claim the benefit of a presumption. It is enough that all the decisions of the Supreme Court, in admiralty as well as in common law, require that the jurisdictional fact shall affirmatively appear, and that no facts are alleged as to where the goods were injured. It is therefore submitted that the decree should be reversed, the default set aside and the cause be remanded with leave to libellant to amend its libel if it can show jurisdiction and serve the same on the respondent.

II.

Even if the suit had sounded in contract for a carriage from Philadelphia down the Atlantic to the Isthmus of Panama, across the Isthmus to the Pacific and thence to Portland, there is no allegation that there was a breach of the agreement for that portion of the carriage which was on the sea, and hence no jurisdiction laid in admiralty.

We have shown that the libel and decree both treat the action as laid in tort. However the result would be the same if it had been laid in contract for a carriage by sea from Philadelphia to Christobal, across the isthmus by rail to Balboa and thence by sea to Portland. The federal courts are ready to enforce the maritime portions of contracts of mixed maritime and non-maritime contracts when they are severable but hold that admiralty has no jurisdiction on an action brought on non-maritime portions of a contract both maritime and non-maritime.

Probably the most striking case on this point is decided by this court.

Pacific Coast S.S. Co. v. Ferguson, 76 Fed. 993.

In that case the court squarely broke in two what it considered to be maritime and non-maritime parts of one contract and held that the admiralty would enforce the maritime part of the contract but could not enforce the non-maritime part. Here grain was ordered to be shipped from a port called Moss Landing to San Diego. The grain had been previously shipped by rail from Blanco, an inland point, to Moss Landing and

was at that point liable for storage and railroad freight charges. The Pacific Coast SS. Co. claimed that as part of the contract of shipment by water the shipper had agreed to pay the warehouse and railroad charges. On a plea to the jurisdiction the court held that, while the contract so far as it related to transportation by sea was purely maritime, so far as it related to railroad charges it was non-maritime and the admiralty court had no jurisdiction of a suit to enforce it.

Pacific Coast Co. v. Ferguson, 76 Fed. 993.

The comment of this court in the same case on the decision in *The Richard Winslow* is most illuminating.

“In the case of *The Richard Winslow*, 67 Fed. 259, which was subsequently affirmed by the Circuit Court of Appeals of the seventh circuit, (18 C. C. A. 344, 71 Fed. 426), a schooner had received a cargo of corn for transportation from Chicago to Buffalo at three cents per bushel, ‘including free storage in vessel at Buffalo harbor until April 1, 1894’. The vessel arrived at Buffalo in November, 1893. The consignors libeled the vessel upon a claim for damages to the cargo while stored in the vessel after her arrival at Buffalo. The court dismissed the libel, upon the ground that the portion of the contract which provided for storage after the arrival of the vessel at her port of destination was not maritime, and was not cognizable in the admiralty. In that case the consideration was not apportioned to the two services which were to be rendered by the vessel. It was entire. It is directly deducible, from the conclusions arrived at by both the courts, that, had the libel been brought by the owners of the vessel to recover the freight money under the contract, it would have been dismissed for want of jurisdiction, upon the ground that it was not based wholly upon a maritime con-

tract. A similar doctrine was applied in *The Pulaski*, 33 Fed. 383; *The Murphy Tugs*, 28 Fed. 429."

Pacific Coast SS. Co. v. Ferguson, 76 Fed. 993 at 996.

This holding of the court simply follows out the rule long observed in admiralty. In *Alberti v. The Virginia*, 1 Fed. Cas. 141 (C. C. S. D. N. Y., 1840), Mr. Justice Thompson, then on circuit duty, said:

"If a charter party embraces stipulations purely of a personal nature, having no relation to maritime service, in the safe carrying and delivery of the cargo, the admiralty jurisdiction of the District Court could not reach the case and afford relief for a breach of such part of the contract."

Richard v. Holman (D. Ct. May, 1903), 123 Fed. 734;

The Evangel, 94 Fed. 680;

The Murphy Tugs, 28 Fed. 429, 432.

So in contracts of shipment, the determination of the courts to break up contracts involving maritime and non-maritime matters, allowing admiralty jurisdiction over the maritime parts only, has been well brought out in two comparatively recent cases.

In *The Pulaski*, 33 Fed. 383, D. E. D., March, 1888. A vessel, at close navigation on lakes, received on board a cargo of wheat, to hold in storage till spring, and if not then discharged to transport the same. It was held that the contract was not maritime, and the court of admiralty had no jurisdiction of a suit brought for damages received during the winter. Henry B. Brown,

D. J., later justice of the United States Supreme Court, in rendering the opinion, said:

“If the storage were a mere incident to the transportation, as, for instance, if the wheat were taken on board with the understanding that the vessel should sail as soon as a tug or consort should be procured, or as soon as the ice should leave the harbor. I should have no doubt that the vessel would be liable for any damage received by the cargo by reason of improper storage while waiting departure. In such case, the *storage being a mere incident of the transportation*, the whole contract would be adjudged to be maritime, and *a suit would lie in the admiralty for any damage occasioned after the cargo was received on board.*”

The Pulaski, 33 Fed. 383.

These decisions are squarely in accordance with the contention of this brief. No one would deny that hauling goods on a railroad is just as much a non-maritime service as storing the goods. Neither of the acts are within the jurisdiction of admiralty nor are contracts calling for such acts in such jurisdiction.

Fortunately, however, the Supreme Court of the United States has passed upon a through contract of passage from New York to San Francisco, and has considered it as devisable into three contracts, New York to Colon, Colon to Panama, and Panama to San Francisco, in relation to the jurisdiction of admiralty over it.

The Moses Taylor, 4 Wall. 411.

Here one Hammond entered into through contract with Roberts, owners of *The Moses Taylor*, for his trans-

portation, with reasonable despatch from San Francisco to New York, via Panama. Plaintiff alleged in breach that he was detained at Panama eight days and *that the provisions on the voyage and the cabin were unhealthy*. He brought suit against the vessel in a justice's court in California, under a state law. The court held the contract was maritime and that the state courts had therefore no jurisdiction in rem in so far as it was a contract between San Francisco and Panama.

Field, J., declared: "The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by *The Moses Taylor*, but the case was tried upon the supposition that such was the fact, and we shall, therefore, *treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco*. For an alleged breach of this contract, the present action was brought under the statute mentioned, in a court of a justice of the peace, held within the City of San Francisco * * *

"The case is clearly one within the admiralty and maritime jurisdiction of the federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it *related exclusively to a service to be performed on the high seas*, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise."

The Moses Taylor, 4 Wall. 411, at 426, 427.

It is illuminative to read the comment by Morrow, then D. J., in the *Moses Taylor* case, made in *The Willamette Valley*, 71 Fed. 715 (D. C. N. Cal. 1896).

“In the Supreme Court it was contended, in favor of the jurisdiction of the state court, among other things, that, as the land carriage at the Isthmus was a substantial part of the voyage, the jurisdiction of the admiralty court did not attach, for the reason that a contract, to come within that jurisdiction ‘must be wholly of admiralty cognizance, or else it was not at all within it’; citing the case of *The Pacific*, *supra*. The Supreme Court held that the case presented was clearly one within the admiralty and maritime jurisdiction of the federal courts, and that the state court had no jurisdiction of the case in a proceeding in rem. Clearly, the court did not consider the incidental land transportation at the Isthmus, or the breach of contract involved in the detention of the plaintiff on land, *as impairing the admiralty jurisdiction over that part of the contract relating exclusively to a service to be performed on the high seas*, and pertaining solely to the business of commerce and navigation.”

The case was preceded by *Phoenix Ins. Co. v. Erie & W. Transportation Co.*, 19 Fed. Cases 1112 (D. C. E. D. Wis. 1879), which involved a contract made for the shipment of grain from Chicago by which it was agreed that the Anchor Line should carry the grain to Erie and deliver it to the Elevator Company, as agent of the consignee, for transshipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual custody the grain might be at the time of the loss. The court held that *in case of loss while the grain was in the course of*

water transit, the court of admiralty had jurisdiction of an action against the Anchor Company.

Dwyer, C. J.: "The true test of a maritime contract or a maritime service, is whether it is to be substantially performed and rendered on navigable waters. If it is, then it is of maritime character and the court of admiralty has jurisdiction. If it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. *The loss happened upon these waters, while such service was being rendered*, and under the construction of the contracts before given and by virtue of the principle last stated, I cannot doubt that a court of admiralty has jurisdiction of the subject matter of this suit."

Phoenix Co. v. Trans. Co., 19 Fed. Cases, at 535.

Now, presuming that in the case at bar the libel counted on a contract to carry on the two oceans and across the Isthmus of Panama, there is no allegation of a breach of the promise to carry safely on the oceans. For all we can tell, the breach alleged (if it be a breach) applies solely to the portion of the promise to carry safely over the Isthmus. All that was said in the last chapter about the necessity for the affirmative pleading of the facts conferring the jurisdiction, applies here. Such facts as to the breach are not pleaded, and the relief suggested in the last chapter, we submit, should be granted.

III.

The want of jurisdiction for the decree appears affirmatively in the libel for if it is founded at all on a maritime contract or tort, the damages claimed therefor are so interwoven in the libel with damages claimed for breach of a separate non-maritime contract to procure insurance, over which it has no jurisdiction, that the two can not be segregated.

Not only is a failure to allege jurisdictional facts a matter that may be availed of by either party, at any time, but the appellate court itself, even where neither party has raised the point, will take cognizance of the defect and reverse the decree of the lower court. It therefore makes no difference whether the point raised in this section is sufficiently assigned as error.

Metcalf v. Watertown, 128 U. S. 586;

Minnesota v. Hitchcock, 185 U. S. 373.

As we have pointed out in our opening statement, the libel relies on two causes of action, first, the negligence in stowage, loading, etc., and, second, the breach of an agreement to procure insurance of the cargo.

In this connection, it is important to note that the contract for insurance is not a mere incidental part of the obligation to carry the goods. It is a separate obligation, and has an entirely separate consideration. In article 7 of the libel (page 7), it is alleged that "The respondent neglected to insure said shipment and to deliver insurance policies to libelant; and respondent has failed to collect and pay or cause to be paid any insurance to libelant on account of the said loss and

“ damage, although libelant paid respondent certain “ sums, for which respondent presented bills, as in- “ surance premiums,” while in article 8 the total loss is set forth as \$6,988.81, “including the *freight* in- “ surance and other charges paid to respondent by “ libelant”. That is to say, the carriage for which freight was paid was a transaction separate from the agreement to insure for which the moneys advanced for premiums were the consideration.

Yet nowhere in the libel is there any separate statement as to how much those premiums were, or how much the damage to cargo was. The court knows that both together, plus the freight moneys, equaled \$6,988.81 for the sixth and eighth articles allege it so, but how much of this is for the maritime tort and how much for the non-maritime obligation for breach of the agreement to insure, or the obligation to return the premiums, is nowhere disclosed.

It therefore follows that any decree based on an allegation in a libel of a damage for breach of a non-maritime contract is in excess of the court’s jurisdiction and must be reversed.

The principle involved is not unlike that set forth by Taney, J., in *Turner v. Beacham*, decided by the circuit court of Maryland:

“And I consider it to be a clear rule of admiralty jurisdiction, that although the contract which the party seeks to enforce is maritime, yet, if he has connected it *inseparably* with another contract

over which the court has no jurisdiction, and they are so blended together that the court cannot decide one with justice to both parties, without disposing of the other, the party must resort to a court of law or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy.”

Turner v. Beacham, Fed. Cases 14,252, at page 348.

If this be true where the two elements are blended in a single contract, it is true a fortiori where the transactions are entirely separate and only “inseparably blended” in the pleading of the damages from both in a single sum.

That the contract to procure insurance is a non-maritime contract, is clearly established by the following cases:

Marquardt v. French, 53 Fed. 603;

Reliance Lumber Co. v. Rothschild, 127 Fed. 745;

City of Clarksville, 94 Fed. 201;

Harvey and Henry (C. C. A.), 86 Fed. 656;

The Thames, 10 Fed. 848;

Crystal Stream, 25 Fed. 575;

The Paola R., 32 Fed. 174;

Doolittle v. Knobloch, 39 Fed. 40;

Diefenthal v. Hamburg American SS. Co., 46 Fed. 397.

The case at bar, with its separate considerations for its maritime and non-maritime transactions, is clearly distinguishable from *Nash v. Bohlen*, 167 Fed. 427, where the contract of affreightment and for insurance was alleged as a single contract, and from *Rosenthal v. The Louisiana*, 37 Fed. 264, where, for a single consideration, the ship agreed to carry and insure and “the basis of the ship’s liability is a maritime contract”.

It is therefore submitted that the decree was beyond the jurisdiction of the District Court in admiralty and must be reversed.

IV.

The decree should have dismissed the libel, it appearing from the bills of lading that the damages for injury to cargo were to be computed on the values at the point of shipment, and there being no allegations in the libel or proof at the hearing of such value.

The court sitting in admiralty is a court of appeal and not of error. The trial is theoretically a new trial and the whole case is before the court. The rule requiring assignments of error is enforced with great liberality and plain errors not assigned are duly considered by the court.

City of Memphis v. St. Louis Ry. Co., 183 Fed. 529;

Chicago R. I. & P. Ry. Co. v. Barrett, 190 Fed. 118 at 125;

Rule 11, C. C. A., 9th Circuit.

The error set forth in this chapter of our brief is "obvious upon inspection and of a controlling character."

P. P. Mast Co. v. Drill Co., 154 Fed. 45 at 51.

It is that the bills of lading offered in evidence by libelant show an agreement that respondent's damages shall be based on the valuation at the time and place of shipment, and that there is no evidence in the record, nor any allegation in the libel (even if a claim for unliquidated damages could be admitted by a default) as to what that value was.

As we have pointed out, the libel alleges in article 6 (page 6), that the value of the goods destroyed by the negligence of respondent “*at the City of Portland on the 22nd day of February, 1911, the date of arrival of said merchandise, was \$6988.81,*” and in article 8 (page 7), that the schedule annexed sets forth the “market value of the goods * * * amounting to “the sum of \$6988.81, *as aforesaid*”, that is to say at Portland on arrival. The schedule itself follows out this allegation and is cast in the form of a sold note for the goods by the libelant to the respondent, *at Portland* (apostles, page 10).

At the trial, the libelant introduced seven bills of lading, in the first four of which it appears that the shipper and carrier agreed that “the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price if any to the consignee, including the freight charges if prepaid) at the place and time of shipment under the bill of lading” Exs. 3 (both bills), pages 4 and 5 (section 3 of endorsement on each). In the next three bills a similar agreement is made in the following words: “All liability under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment” (section 4 of endorsement).

There is no allegation in the libel, nor any evidence in the record, that the market value of the goods *at*

Portland is the same as at the point of their shipment. There is therefore nothing in the record to sustain the finding that the damages amounted to \$7288.42 (page 15) or any relevant evidence or admission by default whatsoever on the question of damages.

It is elemental that a valuation on the Atlantic seaboard in December is not evidence of a value two months later at Portland, over three thousand miles away.

Carver's Carriage by Sea, 4th Ed. 727;

Texas Ry. v. White, 80 S. W. 641;

Railway Co. v. De Shong, 39 S. W. 260 (Ark.).

As it stands then, there is absolutely nothing in the record on which to base any decree for damages. It is submitted that the decree must be reversed.

V.

The court had no jurisdiction over the person of the respondent to amend the libel to a greater amount than that originally set forth, nor to render a decree for such greater amount.

The libel alleged a damage of \$6988.81, based on a valuation at Portland, which we have shown is irrelevant under the stipulation in the bill of lading. However, even if it were relevant, respondent's default admitted only this amount. The decree after default allows an amendment to the libel increasing the claim of damages for negligence to \$7288.42, and decrees for that amount and interest.

That a default admits only those matters which are clearly pleaded is elemental.

Ohio Cent. Ry. Co. v. Central Trust Co., 133 U. S. 83, 90;

Thompson v. Wooster, 114 U. S. 104;

U. S. v. Tomato Catsup, 166 Fed. 773;

Davis v. Sheiden, 104 U. S. 83.

As a default gives jurisdiction in personam over the defendant only for these admitted matters, a judgment in excess of the amount claimed is outside the court's jurisdiction and must be reversed.

Ruth v. Smith, 68 Pac. 278 (Col.);

Russell v. Shurtliff, 65 Pac. 27;

Seltzer v. Davenport Co., 49 Atl. 852 (Conn.);

Johnson v. Mantz, 27 N. W. 467 (Ia.);

23 Cyc., 764, and cases.

The decree is therefore on the face of the record in excess of the court's jurisdiction obtained by the default and the point as a jurisdictional question can be raised on appeal without assignment of error. Even under Rule 11, no error could be plainer.

As the damages are unliquidated, the defect cannot be remedied by a mere reduction of the amount awarded.

Ruth v. Smith, 68 Pac. 278.

It is therefore submitted that the decree must be reversed.

Respectfully submitted,

T. A. THACHER,

G. S. ARNOLD,

WILLIAM DENMAN,

Proctors for Appellant.

DENMAN AND ARNOLD,

Of Counsel.

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IN THE
United States Circuit Court
of Appeals
FOR THE NINTH DISTRICT

CALIFORNIA-ATLANTIC STEAMSHIP
COMPANY, a Corporation,

Respondent-Appellant,

vs.

CENTRAL DOOR AND LUMBER COM-
PANY, a Corporation,

Libelant-Appellee.

No. 2116

Brief of Libelant-Appellee

UPON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

Statement

In November, 1910, the Appellee entered into an agreement with the Appellant, a common carrier, to ship from Philadelphia on a steamer of the Appellant certain goods of Appellee, viz: Asphalt roofing, deadening felt, building paper, paint, window glass and plate glass for

delivery to the Appellee at Portland, at an agreed freight rate.

The contract between the parties consists of the two letters shown on pages 29 and 30 of the record. No bills of lading were issued to Appellee, and Appellee had no notice of any bills of lading, or of their contents, issued by Appellant, until long after the loss occurred.

These goods were shipped at Philadelphia, in the month of December, 1910, on board the steamship "MILLS," and arrived in Portland on Appellant's steamship "STANLEY DOLLAR" about February 22, 1911, and after payment by the Appellee of charges, including freight advanced to railroads, insurance premiums and freight earned by Appellant, amounting to \$1233.81, the goods were delivered to Appellee. The bills were presented, while the goods were still on board the vessel, and before Appellee was permitted to examine the shipment and its bad condition was not discovered until the shipment was landed on the wharf. The libel avers that the goods had been water soaked, compressed, broken and otherwise damaged, by negligence of the Appellant, in stowing, handling, and carrying the same.

Appellee promptly notified Appellant of its claim for damage; and March 16th, 1911, at the request of Appellant, sent certified copies of original invoices covering the shipments, with the claim for damages. The Appellant thereafter for several months, failed to make any statement to Appellee in regard to the damage, or to settle for the same, or to make any response to the letters of Appellee except that the matter was being investigated, and on the 5th of July, 1911, Appellee filed a libel *in personam* with a clause of foreign attachment, and Appellant thereafter appeared in the cause and filed its stipulations for costs and value and

took an order by stipulation extending its time to further appear until August 21, 1911.

No further stipulation was made between the parties and in the latter part of September, one of the proctors for the Appellee met one of the proctors for the Appellant and stated to the latter that he had been in default for a month and that unless an answer was filed shortly, further courtesy would not be extended. Proctor for Appellant replied that he would file his answer during the first week in October. No answer having been filed, nor any further stipulation made in regard to the matter, either verbal or written, the default of Appellant was taken in open Court on October 27, 1911; and proof of the facts stated in the libel was offered and final decree entered on October 30, 1911.

The statement that counsel for Libellant informed Respondent's counsel that no default would be taken without prior notice is *dehors* the record and is denied, and was denied on the motion to open the default, but even if the counsel for the Appellant understood the counsel for Appellee to make such a statement, counsel for Respondent did have notice, as above stated when he was told if he did not answer immediately, further courtesy would not be extended.

But the motion to open the default is not before this Court and would not have been alluded to except for the statement made on page 5 of Appellant's brief.

On the motion to open the default no meritorious defense was set forth and the motion was denied, and from the decree rendered by the District Court in favor of Appellee, Appellant now appeals and attacks the jurisdiction of the admiralty court.

It will be observed by the Court that the record does

not purport to contain all the evidence but only certain exhibits and that there is no certificate by the District Judge that all the evidence appears in the record. The letters (p. p. 29, 30) were offered to show the contract between the parties; the bills of lading were offered, as an admission on the part of Appellant that the goods were received in good order and condition and oral evidence was also offered on this point. Therefore, in the absence of the evidence from the record, this Court is bound to presume that proper and sufficient evidence was offered to sustain the decree and the averments of the libel.

Upon the record, as it stands, it conclusively appears that the Appellant is a common carrier, and liable as an insurer; that the contract between the parties was one of affreightment; was to be wholly performed upon the sea, except as to portage across the Isthmus of Panama, and was therefore maritime; that the goods were delivered in good order and condition on board Appellant's steamer at Philadelphia; that the goods were delivered to Appellee from Appellant's steamship at Portland, in a damaged condition due to contact with water, breakage, improper stowage, handling and carriage by Appellant; and that all the facts with respect thereto are peculiarly within the knowledge of Appellant, its servants, agents and employees; and that the burden was upon Appellant to allege and prove, if it could, any matters of defense and excuse for non-performance of the contract which was entire; and that Appellant wholly failed to discharge this burden.

Points and Authorities

I.

The legal presumption is in favor of the decree.

Masterson vs. Howard 18 Wall. 99.
Thompson vs. Wooster, 114 U. S. 104-114.
Miller vs. U. S. 11 Wall. 268.
Bixby vs. Deemar, 54 Fed. 718.
The Philadelphian 60 Fed. 423.
Nelson vs. White, 83 Fed. 215.
The Brandywine, 87 Fed. 652.

II.

The ruling of the District Court upon the motion to open the default is not reviewable on appeal.

Cape Fear T & Trans. Co. vs. Pearsall 90 Fed. 435.

III.

The contract between the parties is within admiralty jurisdiction.

New Jersey Steam Navigation Co. vs. Merchants Bank, 6 Howard 344.
Moorewood vs. Enequist, 23 Howard 491 p. 493.
The Moses Taylor, 4 Wall. 411.
Insurance Co. vs. Dunham, 11 Wall. 1 p. 29.
Phoenix Ins. Co. vs. Erie & W. Transportation Co., Fed. cases No. 11, 112. Vol. 19, p. 553 affirmed in 117 U. S. 312.
Monteith vs. Kirkpatrick, 3 Blatch 279; Fed. cases No. 9271.
Dailey vs. City of New York, 128 Fed. 796-798.

IV.

The burden was upon the Respondent to excuse its non-performance of the contract of affreightment.

The William Taber 30 Fed. cases 17957.
Clark vs. Barnwell, 12 How. 130.
Propeller Niagara vs. Cordes, 21 Howard 7 p. 29.
The Edwin I. Morrison 153 U. S. 199-211.
The Majestic 166 U. S. 375-386.
Cuming vs. The Baracouta, 40 Fed. 498.
The Lydian Monarch 23 Fed. 298.,
The New England 110 Fed. 415.
Southern Pacific Co. vs. Arnett 111 Fed. 849-852.
Pacific Coast Steamship Co. vs. Bancroft-Whitney
Co. 94 Fed. 180-196.

V.

The libel does not sound in tort.

New Jersey Steam Navigation Co. vs. Merchants
Bank, 6 Howard 344, 411-412.
The Plymouth, 3 Wall 20-34.
Whittenton Mfg. Co. vs. M. & O. River P. Co.,
21 Fed. 896.
Pacific Coast Steamship Co. vs. Bancroft-Whitney
Co. 94 Fed. 180-193.

VI.

The presumption is that the damage occurred while the goods were in Respondent's possession.

6 Cyc. 491 and authorities cited in note.

Argument

The libel alleges that the Respondent is a common carrier, and employed steamships in carrying cargo between Philadelphia and other Atlantic ports, and Portland and other Pacific ports, and among the steamships so owned or chartered by the respondent were the steamships "MILLS" and "STANLEY DOLLAR," and that in the month of December, 1910, pursuant to an arrangement theretofore made with Respondent, Libelant shipped and caused to be shipped, in good order and condition on board the steamship "MILLS" at Philadelphia, certain goods, wares and merchandise, properly packed for carriage and handling consigned to Libelant at Portland, Oregon.

That on or about the 22nd day of February Respondent notified Libelant that said goods and merchandise had arrived at the dock in Portland by the steamship "STANLEY DOLLAR" and presented charges for freight and insurance premiums and demanded payment therefor, while the merchandise was still in the hold of the steamship; and after payment of said bills, Respondent delivered the merchandise in damaged condition.

The libel further alleges that the building paper had been *damaged by water*; the glass had been broken by improper handling; that the packages of paint were broken and contents spilled; that the shipment was improperly *stowed, carried and handled by Respondent, its employees, agents and servants*. The libel is therefore founded upon a contract of affreightment, a very substantial part of which was to be performed upon the sea, and what the contract was, appears from the letters which appellant has attached to the record, pages 29 and 30. The bills of lading attached

to the record, pages 31 to 36 are not the contracts between the Libelant and Respondent; they are not made with Respondent nor assigned to it and are not entitled to be considered by the Court on this appeal. They were offered in the District Court merely for the purpose, in connection with other proof, of showing that the goods were received by Respondent on board its steamship at Philadelphia in good order and condition.

Over six thousand miles of the carriage was upon the sea; less than fifty miles of carriage occurred on land across the Isthmus of Panama; the goods were delivered in a damaged condition and the legal presumption is that the damage occurred through the fault of the carrier while the goods were in its possession, in the absence of any averment or proof, on behalf of the carrier, to the contrary. There is nothing in the libel in regard to the condition of the goods when delivered which warrants the inference that the damage occurred elsewhere than on shipboard. On the contrary the averment that the cargo was water soaked clearly indicates that the damage occurred on board ship, and the allegation that the *goods were improperly handled and stowed by Respondent*, its agents, servants and employees, is also an allegation to the same effect, viz., that the damage occurred while the goods were on board ship.

The argument in appellant's brief is based upon an erroneous assumption of law, viz; that the burden is upon the Libelant to show where and how the damage occurred; that this is erroneous we shall hereafter show by the authorities cited. It is also based erroneously upon an assumption of fact, instead of a proved fact, to-wit: that the damage occurred on land. Having assumed two false premises, the argument proceeds necessarily to a false conclusion.

No meritorious defense is suggested; the damage occurred between the latter part of December, 1910, and the

latter part of February, 1911. The facts in respect to the cause thereof were peculiarly and solely within the knowledge of Respondent, and although the Respondent had due notice from the Libelant of the damage claimed with full particulars thereof, in March, 1911, no suggestion of adjustment or excuse was made, and the libel was filed July 5, 1911, and the default was not entered until more than two months after the Respondent became in default. This Court must also assume that no sufficient grounds were urged for the opening of the default on the motion made for that purpose in the District Court, and therefore the question before this Court is purely one of jurisdiction.

We contend—First: That, under the authorities and the practice, the contract of carriage was one which was to be substantially performed upon the sea and is therefore maritime and within admiralty jurisdiction.

Second: That the libel having alleged receipt by Respondent on its steamship at Philadelphia in good condition, and delivery by Respondent at Portland, in a damaged condition, the burden was upon Respondent to excuse itself, and having wholly failed so to do, it cannot now, by this appeal, impose a burden upon the Libelant which did not rest upon it in the Court below.

I.

THE LEGAL PRESUMPTION IS IN FAVOR OF THE DECREE.

The decree having been taken *pro confesso* the presumption is that all the facts necessary to warrant the decree have been properly found, if they are substantially averred in the libel.

This is the unquestioned rule in equity practice.

Masterson vs. Howard, 18 Wall. 99.

In this case the rule was laid down as above stated. The question of jurisdiction was also raised in that case on the ground that the decree *pro confesso* was rendered in a suit between alien enemies (Citizens of California and Illinois against citizens of Texas), during the Civil War and before its termination, and was therefore a nullity. The Court denied the contention and upheld the jurisdiction.

Thompson vs. Wooster, 114 U. S. 104-114.

In that case the Court held the rule substantially as above stated.

Miller vs. U. S., 11 Wall. 268.

The rule in admiralty and revenue cases appears in the syllabus as follows:

"4. In admiralty and revenue cases when a default has been duly entered to a monition founded on information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded and justified a decree of condemnation.

"5. Where a Court having jurisdiction of the case and of the parties enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings."

Bixby vs. Deemar, 54 Fed. 718-720. (Circuit Court of Appeals, Fifth Circuit).

A libel *in personam* was filed for loss of cargo on Respondent's steamer.

Held: That a decree in admiralty awarding damages to a shipper should be affirmed on appeal when it does not clearly appear on what grounds the District Court based its award, and the proof does not clearly fail to show that the

loss was caused by the master's neglect to use proper means for saving the cargo.

The Philadelphian 60 Fed. 423. (Circuit Court of Appeals, First Circuit).

Held: Unless the proofs in instance causes in the District Court which are intended for review in the Circuit Court of Appeals, are in some form reduced to writing, or an equivalent therefor is found in the record, the Court will decline to try the facts anew.

Nelson vs. White, 83 Fed. 215. (Circuit Court of Appeals, Ninth Circuit).

The Court said at page 218:

"Therefore, both under the rules of the Supreme Court and of this Court, and of the doctrine laid down by the Supreme Court, that an appeal in admiralty is a trial *de novo*, the testimony taken in the Court below should have been certified up in the transcript of record on appeal, in the absence of a stipulation that it might be omitted."

The Brandywine 87 Fed. 652. (Circuit Court of Appeals, Fourth Circuit).

Held: It was the settled practice of these Courts to give great weight to the conclusions of fact by the trial judge, unless they are based on evidence manifestly insufficient.

II.

THE RULING OF THE DISTRICT COURT UPON
THE MOTION TO OPEN THE DEFAULT IS
NOT REVIEWABLE ON APPEAL.

Cape Fear T. & Trans. Co. vs. Pearsall, 90 Fed. 435. (Circuit Court of Appeals, Fourth Circuit).

Held: That the opening of a default in admiralty being discretionary with the Court under Admiralty Rules

29 and 40, the ruling of the District Court upon the motion therefor is not reviewable in the Court of Appeals, citing many authorities supporting the proposition.

The rule is so well settled that it is unnecessary to comment further upon it, and is only stated in answer to Appellant's Assignment of Error VIII, to the effect that the Court erred in denying the application of Respondent for an order setting aside the default and we do not understand that the appellant really insists upon the assignment of error in that behalf.

III.

THE CONTRACT BETWEEN THE PARTIES IS WITHIN ADMIRALTY JURISDICTION.

The contract between the parties was an entire contract of affreightment, the substantial performance of which was to be upon the sea and is therefore maritime and within the jurisdiction of admiralty.

New Jersey Steam Navigation Company vs. Merchants Bank, 6 Howard 344 is a leading case on the subject. The suit was instituted upon a contract of affreightment for the purpose of recovering a large amount of specie lost on the "Lexington," one of the steamers of Respondent running between New York and Providence, which took fire and was consumed in the month of January, 1840 on Long Island Sound.

The Respondent objected, first: That the suit was not maintainable by the Libelants, the contract having been made with the expressman, Harnden; second, that if the suit could be maintained for the Libelants they must succeed if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and third, that the District Court had no juris-

diction, the contract of affreightment not being the subject of admiralty cognizance.

The case was ably argued by eminent counsel, and the prevailing opinion was written by Justice Nelson, and after an exhaustive discussion of the subject, the conclusion of the Court is summed up in these words, (p. 392) :

“On looking into the several cases in admiralty which have come before this Court, and in which its jurisdiction was involved, or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the Court of Admiralty in England but into the nature and subject matter of the contract; whether it was a maritime contract, and the service, a maritime service to be performed upon the sea, or upon water within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea, or tide waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract, is to be performed beyond tide waters, or if the contract relates exclusively to the interior navigation and trade of a State, jurisdiction is disclaimed.”

Moorewood vs. Enequist, 23 Howard, 491.

In this case Mr. Justice Grier delivered the opinion of the Court and said on page 493, in reference to the question of jurisdiction :

“We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of the New Jersey Steamboat Co. vs. The Merchants Bank of Boston, 6 Howard 344, was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated both by counsel and the Court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day — everything which the industry, learning and re-

search, of most able counsel could discover, was brought to our notice. We then decided that charter parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and Act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*."

The Moses Taylor, 4 Wall. 411.

In this case one Hammons entered into a contract with Roberts as owner of the steamship, for transportation from New York to San Francisco, as a steerage passenger, with reasonable dispatch and to furnish him with proper and necessary accommodations on the voyage. For alleged breach of this contract Hammons brought an action, under a law of the State of California, against the vessel in the Justice's Court of San Francisco. The breach alleged was that the plaintiff was detained at the Isthmus of Panama eight days and that the provisions furnished him on the voyage were unwholesome and that he was crowded into an unhealthy cabin, without sufficient room or air for either health or comfort, in consequence of a large number of steerage passengers, more than the vessel was allowed by law to have, or could properly carry. The agent of the vessel filed an answer in which he denied the allegations of the complaint, and asserted that the Court had no jurisdiction, because the cause of action as against said vessel, was one of which the Courts of Admiralty had exclusive jurisdiction. The justice decided that he had jurisdiction and gave judgment for the plaintiff. The case was taken to the County Court, where the objection to the jurisdiction was again made and again overruled, and, final judgment being entered in favor of the plaintiff, the case was taken to the Supreme Court of the United States on a writ of error.

In the Supreme Court it was contended, in favor of the jurisdiction of the State Court, among other things that, as the land carriage at the Isthmus was a substantial part of the voyage, the jurisdiction of the Admiralty Court did not attach, for the reason that a contract, to come within that jurisdiction, "must be wholly of admiralty cognizance, or else it was not at all within it." The Supreme Court held that the case presented was clearly one within the admiralty and maritime jurisdiction of the Federal Courts, and that the State Court had no jurisdiction of the case in a proceeding *in rem*."

Insurance Company vs. Dunham 11 Wall. 1.

In this case a libel *in personam* had been filed in the District Court for the District of Massachusetts on a policy of insurance dated at Boston, whereby the Insurance Company, a Corporation of Massachusetts agreed to insure Dunham, the libelant, a citizen of New York in the sum of Ten Thousand Dollars on a vessel called "The Albina" for one year and the libelant alleged that within a year the vessel was run into by another vessel on the high seas through the negligence of those navigating the other vessel and had thereby sustained damage of which he claimed payment from the Insurance Company. The question was whether the District Court, sitting in admiralty had jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

Mr. Justice Bradley delivering the opinion of the Court, after referring to the case of the New Jersey Steam Navigation Company vs. The Merchants Bank, which he stated "was a libel *in personam* against the Company *on a contract of affreightment* to recover for the loss of specie by the burning of the steamer "Lexington" on Long Island Sound, says at page 28:

"In the case of *The Moses Taylor*, 4 Wall. 411, it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract, and cognizable in admiralty, *although a small part of the transportation was by land, the principal portion being by water*. In a late case of affreightment, that of the *Belfast*, it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of Interstate Commerce. But as the transportation was on a navigable river, the Court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford delivering the opinion of the Court says: "Contracts, claims or service, purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries, committed on navigable waters, of a civil nature are also cognizable in the Admiralty Courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality." It thus appears that in each case the decision of the Court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the Court."

And it was held that the Admiralty Court had jurisdiction over policies of marine insurance.

Phoenix Ins. Co. vs. Erie & Western Transportation Co. Fed. Cases 11, 112, Vol. 19 p. 532.

In this case there was a shipment of grain brought from Chicago under contract of affreightment by which it was agreed that the Anchor Line of propellers should carry the grain to Erie, Pa., and there deliver it to the

Elevator Company for trans-shipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named.

Dyer, J., delivering the opinion of the Court, says at p. 534 on the question of jurisdiction:

"It is true that the bills of lading denote a rate of freight for a continuous transportation service from the point of shipment to inland points in the States named; and to that extent they may be characterized as through contracts.

"It is true also that part of this service was to be by rail but the service to be performed by the Anchor Line was to be exclusively on water."

After alluding to illustrations put by counsel for respondent as tests of admiralty jurisdiction and showing that they were more "ingenious than sound," he further says:

"The true test of a maritime service or a maritime contract is whether it is to be substantially rendered on navigable waters. If it is, then it is of maritime character and the Court of Admiralty has jurisdiction; if it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters while such service was being rendered and under the construction of the contracts before given and by virtue of the principle last stated, I cannot doubt that a Court of Admiralty has jurisdiction of the subject matter of this suit."

Monteith vs. Kirkpatrick, 3 Blatchford 279 Fed. Cases No. 9721.

Judge Nelson said on appeal:

"It is also objected that the District Court had no jurisdiction of the case so far as related to these charges as a portion of them were for the ship-

ment of the flour on the canal. These charges were for freight on Lake Ontario as well as on the canal. The contract therefore as respected the whole amount claimed by the libelants was in judgment of law an entirety, not severable and contains all the essential elements of a maritime contract. The shipment of the goods to which it related began and ended upon waters within the admiralty jurisdiction."

In the case cited the shipment was from Oswego on Lake Ontario, through the Erie Canal to New York City, and libellant claimed recovery for certain charges incurred at Albany and other points, which the respondents claimed were not of maritime character.

Dailey vs. City of New York 128 Fed. p. 796.

The question of jurisdiction was raised; Judge Adams says at page 798:

"Jurisdiction attaches in cases of maritime contract irrespective of the question of whether it is to be performed on land or on water, (citing many cases.)

IV.

THE BURDEN WAS UPON THE RESPONDENT TO EXCUSE ITS NON-PERFORMANCE OF THE CONTRACT OF AFFREIGHTMENT.

The libel alleges a contract of affreightment with Respondent, delivery of the goods in good order and condition upon Respondent's steamship at Philadelphia, and that the goods were delivered from Respondent's steamship in Portland in a damaged condition, and under such circumstances the burden of proving where and how the damage occurred was upon Respondent and not upon Libellant, no matter whether the libel sounds in tort or in contract.

The William Taber Fed. Cases 17957.

The rule is clearly and concisely stated in this case by Blatchford, Justice, as follows:

“In case of loss or damage to goods covered by a bill of lading the presumption of the law is that such loss or damage was occasioned by the act or default of the carrier and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible.”

Clark vs. Barnwell, 12 Howard 130.

The Court says by Mr. Justice Nelson at p. 132:

“And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading? For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulation of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by none of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing a particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the person employed in the conveyance of the goods; for, then, it is not deemed to be in the sense of the law such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty.”

Propeller Niagara vs. Cordes 21 Howard 7.

In this case libels were filed in the District Court and

alleged breach of contract of affreightment, alleging that libelants caused certain goods to be shipped in good order and condition on board the Niagara, and that the master undertook and promised to convey the goods from the port of shipment to the port of destination in like good order and condition. That through the carelessness, negligence and improper conduct of the master, his mariners or servants, the goods became greatly damaged. The answer averred that the steamer was sea-worthy; that her cargo was properly stowed; denied negligence on the part of the master and his mariners; admit that the cargo was damaged, but allege that the damage was occasioned by a danger of navigation excepted in the bill of lading, and for which they ought not in any manner to be held responsible, and alleged that the vessel was stranded during a storm.

After discussing the liability of the carrier under these circumstances, Mr. Justice Clifford says, p. 28:

“These authorities are sufficient, it is believed, to demonstrate the proposition, that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in the case * * * * ”

And again at p. 29:

“Losses arising from the dangers of navigation, within the meaning of the exception set up within this case, are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause, upon the ground that when human exertions are found insufficient to ward off the consequences, the excepted peril may be regarded as continuing its

operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; *and after the damage is established, the burden lies upon the respondents* to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading." (Citing authorities.)

The Edwin I. Morrison 153 U. S. 199.

In this case Chief Justice Fuller, delivering the opinion of the Court, says at p. 211:

"Perils of the sea were excepted by the charter party, but the burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. (*Liverpool Steam Co. vs. Phoenix Ins. Co.* 129 U. S. 397-438). It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated."

The Majestic 166 U. S. 375-386.

In discussing the same subject, the Court says at p. 386:

"The question still remains, on the doctrine of implied exceptions, whether the injury here was by the act of God, for which the Company was not liable. The burden in this respect is on the carrier."

Cuming vs. The Baracouta 40 Fed. 498. (On appeal to Circuit Court, Southern District, N. Y.)

Libel for injury to cargo. The libelants shipped at New York upon *The Baracouta*, in good order, for transportation to Trinidad, Spain, certain casks and kegs con-

The New England, 110 Fed. 415.

A libel was filed in admiralty by a passenger to recover for loss of baggage. Lowell, District Judge, says:

"In this case, the libelant, a passenger, delivered to the Dominion Steamship Company, at its dock in Boston, alongside the steamship *New England*, a trunk containing suitable wearing apparel for herself only. When she arrived at Liverpool the trunk was not to be found, but several days later was forwarded to the address she had left with the Company's agent at Liverpool. At the time she received the trunk its lock had been tampered with, and when that was forced the trunk was found empty. The Steamship Company, though pressed in correspondence by libelant, and though challenged in open court failed to explain the delay in delivery, or to introduce any evidence concerning the treatment of the trunk while detained in its hands. This failure of the libelee to introduce evidence within its sole possession justifies the court in finding that the trunk was broken open and rifled by the Company's servants, and that this fact became known to the managers. *Whether the conversion occurred in Boston, at sea, or in the British Dominions does not appear.*"

Southern Pacific Co. vs. Arnett 111 Fed. 849-852.
(Circuit Court of Appeals, Eighth Circuit).

This was a case brought to recover damages for injuries said to have been sustained by cattle belonging to plaintiffs, while they were being transported by the defendant company over its railroad. Judge Thayer, delivering the opinion of the Court, says at p. 852:

"The action was brought by the plaintiffs in the ordinary form, the complaint alleging certain specific violations of duty on the part of the carrier, by reason whereof the plaintiffs had sustained damage. The defendant answered, pleading the existence of a special contract, and such immunity from its common-law obligations as it had thereby secured. * * * * The point under consideration was not only not made below, but if it had been, we are aware of no rule of law which requires a

shipper who has made a special contract to declare upon it, when he contends that the carrier has been guilty of some negligence of duty on account of which he is liable, notwithstanding the provisions of the contract. A special contract, when exacted by a carrier is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection."

Bancroft-Whitney Co. vs. Pacific Coast Steamship Co. Reported in 61 Fed. 213; 75 Fed. 74; 78 Fed. 155; 94 Fed. 180.

This case which has received so much consideration from the Courts in the Ninth Circuit seems to us to conclusively dispose of every contention here made or which can be made by appellant in the case at bar.

The case as reported in 61st Fed. was discussed by Judge Morrow, on exceptions to the libel. The libel was for damages arising out of breach of contracts of affreightment. At p. 214 Judge Morrow said:

"The contracts declared on are contracts of affreightment entered into between the Pacific Coast Steamship Company and the shippers of the goods. It is a maritime contract, cognizable in the admiralty and this is sufficient."

The exceptions were overruled.

As reported in the 75th Fed. at p. 74, the case was again before the Court on a motion by the claimant for judgment in its favor after Libelants had rested their case. One of the grounds for the motion was that there was no testimony tending to show that the damage complained of was occasioned by the negligence of the carrier.

After setting forth the allegations of the libel, which are substantially the same as in the case at bar, and the averments and denials of the answer, and discussing the question of burden of proof, Judge Morrow says, at p 76:

"In this state of the pleadings, the following salient facts may be deemed established: (1) That the libelants' merchandise was shipped under the contracts of affreightment, or 'shipping receipts,' as they are termed, annexed to the libel; (2) that the merchandise was never delivered at the port of destination; (3) that it was returned to San Francisco and delivered to the shippers in a damaged condition; (4) that this damage was by reason of being wet with sea water; (5) that the fact that the vessel was leaking was discovered about eleven hours after the steamer sailed from San Francisco; (6) that the leak increased to such an extent that the vessel was compelled to put into Port Harford, and was there beached, about 17 hours after sailing from San Francisco. It may be observed, also, that there is a general denial that the merchandise was shipped in good order and condition. The following omissions in the answer are significant, in connection with the other averments and denials, and the established facts: (1) It does not appear from the answer what caused the ship to spring a leak. (2) There is no averment that the vessel, after sailing from San Francisco, encountered any stress of wind or weather to which the leak could be reasonably, or at all, attributed. (3) There is no averment in the answer that the cause of the damage was from a peril of the seas, or any other unavoidable accident.

"Such being the state of facts as disclosed by the pleadings, proctor for libelants contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment. Bills of lading afford prima facie evidence that the merchandise was shipped in good order. (Citing authorities). He also introduced testimony respecting the damaged state, when returned to San Francisco, of one of the shipments. * * * * *

"The libelants then rested their case upon the admitted facts as stated and the supplementary proof referred to. Thereupon proctor for claimant moved for a judgment in his favor and in support of his motion contends that the libelants having failed to show that the merchandise was damaged through the negligence of the steamship company,

its officers and servants, and that they must first do this before the burden of proof is shifted on the carrier."

After citing *Clark vs. Barnwell*, 12 How. 272, the Court further said on p. 78:

"In other words, the rule is that, when the merchandise has been delivered in apparent good order and condition to the carrier, and he delivers it to the consignee at the port of destination, or, as in this case, returns the goods to the shipper in a damaged condition, the presumption of law arises upon proof of delivery of the goods to the carrier in apparent good order and condition, and proof of damage to them, that it was in consequence of the negligence of the carrier; and the burden of proof of showing that the damage arose by one of the perils of the seas excepted in the contract of affreightment, or in some manner other than through the negligence of the carrier, is then cast upon the latter, and, when he has done this, the shipper or consignee still has an opportunity to show, in rebuttal, that, although the loss or damage occurred through a peril of the sea, still it might have been avoided, had the carrier used due skill, care and diligence. This rule appears to me just, logical and reasonable, and is constantly followed in cases of this character." (Citing many authorities.)

The case as reported in 78th Fed. p. 155 was the decision of the Court after hearing the proofs for claimants, and the Court again said, p. 168:

"But, can it be said that the carrier, against whom a prima facie case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment by simply leaving the question as to whether or not the damage was caused by one of the excepted perils or dangers, in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduce how and in what

manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt."

And again, at p. 170:

"The contention of claimant that the libelants having alleged negligence must prove it affirmatively, and that they cannot rely merely upon the prima facie presumption of negligence which the law raises upon proof of the return of the goods in a damaged state, is not tenable; for if this was so it would do away entirely with the prima facie presumption of negligence against the carrier; (citing *Hall vs. Railroad Company* 13 Wall. 272). It would therefore be enunciating a somewhat novel doctrine to say that a shipper is called upon to prove affirmatively that which, upon certain preliminary proof the law presumes against the carrier. I am of the opinion that the carrier has failed in his proofs to bring himself within the exception, claimed by him, of a peril of the sea."

Decree for Libelants.

In the case as reported in 94th Fed. on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the opinion of Hawley, J., the Court says at page 195:

"In a proceedings of this character and under the facts established in this case, the following principles of law are well settled:

"(1) That common carriers by water, like common carriers by land are in the nature of insurers, and are liable for every loss or damage, however occasioned, unless it happens from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading." *Niagara vs. Cordes*, 21 How. 722-26; *Hall vs. Railway Co.* 13 Wall. 367-372.

"(2) That when merchandise is shipped, and the usual bill of lading given, promising to deliver the same in good order, the dangers of the sea excepted, and they are found to be damaged, the *onus*

probandi is upon the owner of the vessel to show that the injury was occasioned by one of the accepted causes. (Citing authorities.)

“(3) That, in every contract for the carriage of goods by sea, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the steamer is the result of latent defects.” (Citing authorities.)

“(4) That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is she was not seaworthy when she sailed.” (Citing authorities.)

The Court after discussing the evidence and citing the rule laid down in “The Compta,” says, p. 200:

“The broad statement is clearly made that it is the duty of the owner, in order to relieve himself, ‘to show that the damage arose, from a sea peril.’ It necessarily follows, that if such facts are known to him, he must prove them. ‘It is not enough for him to show that it might have arisen from that cause. He must prove that it did.’ If the facts are unknown to him then the other methods of proof suggested by Judge Hoffman may, be resorted to—their sufficiency, of course, to be determined by the Court. Common sense and sound reason appeal strongly to the conscience of the Court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumptions.”

The decree of the District Court in favor of Libellant was affirmed.

On Certiorari the case was reversed in 180 U. S. 49, S. C., 45 Law Ed. 419, but upon the single point that the stipulation requiring the claim for loss to be presented within thirty days was reasonable, and binding upon the shipper. None of the other points of the case were dis-

cussed, therefore, the rules above stated by the District Court and the Circuit Court of Appeals, stand as the law of this Circuit.

V.

THE LIBEL DOES NOT SOUND IN TORT.

Mr. Justice Daniel in *New Jersey Steam Navigation Company vs. Merchants Bank*, 6 Howard, discusses this class of cases extensively and says at p. 411:

"They are cases in which a kind of quasi tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract."

And again on p. 412, he says:

"With respect to these cases *ex delicto quasi ex contractu*, as they have been called, it has been ruled, that if the plaintiff states the custom, and also relies on an undertaking, general or special, the action is in reality founded on the contract, and will be treated as such."

In *The Plymouth* 3 Wall. 20-34, cited in Appellant's brief the Court says at p. 34:

"It has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that as the origin of the wrong was on the water, in other words as the wrong began on the water where the admiralty possesses jurisdiction, it should draw after it all the consequences, resulting from the act. These mixed cases, however, will be found not cases of tort, but of contract which do not depend altogether on locality as the test of jurisdiction, such as contracts of material men for supplies, charter parties and the like. These cases depend upon the nature and subject matter of the contract whether a maritime contract and the service a maritime service to be performed upon the sea or other navigable waters, though made upon land."

In *Pacific Queen* 94 Fed. p. 194, the Court says:

"We are of the opinion that the proceeding is founded upon the contract of affreightment, and that the claim for damages is based upon the failure of the Steamship Company to deliver the merchandise in good order and condition, and that the averments in the pleadings as to the negligence are merely illustrative of the manner in which the goods were damaged. It cannot, it seems to us, be legally said that the mere mention of the word 'negligence,' as used in the pleadings, changes the character of the proceedings from one on a contract to one in tort."

The Court said at p. 193:

"In action at common law the pleadings are to be construed strongly against the pleader, and often strictly, without regard to the real substance of the action; but in admiralty the rule is different. All Courts of Admiralty agree in regarding substance of more importance than form, in the proceedings which come before it; and therefore any process in admiralty is, in general, if not always, sufficient, which distinctly brings the substance of a case, and the actual parties, before a proper court in such way as to permit the questions of the case to be investigated, its merits ascertained and justice done."

In view of this statement of the Court it seems to us that the question of whether the libel sounds in contract or in tort, is purely academic.

In *Whittenton Mfg. Co. vs. M. & O. River Packet Co.* 21 Fed. 896, city by Appellant, the Court, says in the opinion at p. 899:

"The action *ex delicto* is for a breach of duty founded on the custom of the realm, and it makes no difference that there is a contract by the carrier out of which the duty arises, unless there is something special in the contract upon which the plaintiff must rely for his action, in which case his suit necessarily must be *ex contractu*. In the ordinary

contract the plaintiff has his choice as to the form of action he will use; and where the action is *ex delicto* the carrier may plead in defense any stipulations of a contract which has relieved him from the alleged breach of duty. (Schouler, Bailm, 575; Hutch. Carr. 748).

"In *New Jersey Nav. Co. vs. Merchants Bank*, 6 How. 344, 381, the Court says: 'The general liability of the carrier independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any loss or damage that may happen to them in the course of conveyance, unless arising from inevitable accident, etc.' Again: 'The burden of proof lies upon the carrier and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.'

"Mr. Hutchinson, in his able work, also discusses this subject, and states the difficulties, even under the old practice, of determining the proper form of action to be brought, and when brought, whether it be one or the other of the two forms allowable. He says that until *Dale vs. Hall*, 1 Wils. 281, the form of action was *ex delicto*, and that case decided that, even where it is on the contract, the declaration is the same in effect as if it had been upon the custom. (Hutch. Carr. 737 et seq.) He calls attention to the perplexities formerly existing in distinguishing one form of action from the other and says: 'The declarations of the two kinds of actions, according to approved formulas, were so nearly alike, that in many cases the astutest judges became perplexed in their efforts to find out to which class the declaration belonged.'"

Therefore, whether the libel be construed as sounding in tort or in contract makes no difference as to where lays the burden of proof. In either case, delivery of the goods to the carrier in good order and condition, and delivery of the goods by the carrier damaged, raises the presumption of his negligence, and casts upon him the burden of relieving himself therefrom.

VI.

THE PRESUMPTION IS THAT THE DAMAGE OCCURRED WHILE THE GOODS WERE IN RESPONDENT'S POSSESSION.

The rule is thus stated in 6 *Cyc.* p. 490-491, and citing an abundance of authorities in the notes to support the proposition:

"Under the American rule that, in the absence of partnership relations or contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred. To render the first carrier liable it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in a damaged condition. The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession. But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier that the goods were still in the condition in which they were received by the first carrier. Indeed the weight of authority seems to be in support of the general proposition that if the goods are delivered by the last carrier in a damaged condition the presumption arises without further evidence that the damage occurred while in the possession of the last carrier, and the burden is upon him to prove that they were in a damaged condition when received by him, the double presumption being entertained that they were accepted in good condition by the first carrier, and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines."

Applying these rules to the case at bar, the case stands thus: The record shows that the goods were delivered to Respondent's steamship "MILLS" at Philadelphia in good

condition; that the goods were delivered by Respondent's steamship "STANLEY DOLLAR" in a damaged condition. No objection having been made by the "STANLEY DOLLAR" to the condition of the goods when received by it at the Isthmus of Panama, the presumption therefore arises that the goods were damaged while on board the "STANLEY DOLLAR," and the burden was therefore upon the Respondent to explain away this presumption. This it failed to do. The legal presumption therefore is sufficient to sustain the decree, and the admiralty jurisdiction, and the decree should be affirmed, with costs.

Respectfully submitted,

JESSE STEARNS,

JOHN H. HALL,

Counsel for Appellee.

IN THE

United States
Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAM-
SHIP COMPANY, a Corporation,

Respondent-Appellant,

vs.

CENTRAL DOOR AND LUMBER
Company, a Corporation,

Libelant-Appellee.

No. 2116

Reply Brief for Appellee

STATEMENT.

After the service and filing of the brief by Malarkey, Seabrook & Scott, proctors for respondent, Denman & Arnold, of counsel for appellant, filed a "supplemental brief" so called, and the appellee in reply to the "supplemental brief," presents the following additional argument and authority:

In the supplemental brief appellant discusses the statements in the libel, paragraph seven, p. 7 of the rec-

ord, that "respondent neglected to insure said shipment and to deliver insurance policies to libelant; and respondent has failed to collect and pay, or cause to be paid, any insurance to libelant on account of the said loss or damage, although libelant paid respondent certain sums for which respondent presented bills as insurance premiums."

There is no allegation in the libel that respondent agreed to procure insurance and no claim is made in the libel for damages against respondent for failure to insure the goods, nor any claim for return of the insurance premiums paid by libelant to respondent. The allegations in respect to insurance merely go to show the careless and negligent non-performance, by respondent, of its agreement. Either respondent procured insurance, or was guilty of obtaining money under false pretences by presenting bills for obtaining such insurance. The allegation in the libel is that "respondent neglected to deliver insurance policies to libelant," although the premiums were paid therefor to respondent. As the record stands it appears that the respondent did procure insurance, and therefore all the argument based upon the point that an agreement to procure insurance is not a maritime contract falls, because no such agreement is alleged, and because insurance was procured; moreover, respondent having rendered bills for insurance premiums and having received payment thereof by libelant, is estopped from saying that there was nothing but a contract to procure insurance. So far as the relations between libelant and respondent were concerned, libelant was a double insurer; it had made itself an insurer by

its own agreement and receipt of insurance premiums; and it is an insurer as a common carrier.

The supplemental brief also discusses the rule of *dagames* at p. 6 et seq. of the brief. In the eighth paragraph of the libel (record p. 7), the allegation of damage is followed by these words, "including the freight, insurance and other charges, paid to respondent by libellant, after deducting all allowances for salvage, on the goods shipped." These words may be regarded as surplusage and are to be construed as though libellant had said "including cost of raw material, labor and cost of manufacture"; in other words, the damage caused to an owner of goods by their destruction covers all elements that go to make up the value at the time they are destroyed, and necessary freight, insurance, or any other item that goes to make up the cost of goods may be considered in computing the amount of damage sustained, and it is clear from the reading of the decree following the allegation of damage in the libel, that the decree was rendered for the damage to the goods sustained by libellant, and there is nothing in the record to show that the rule of damage or the computation by the Court was erroneous.

The supplemental brief also bases an argument on a clause in the bill of lading that "all liability under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment." As shown by the brief for appellee already filed, the respondent is not entitled to the benefit of any stipulation in the bills of lading, not having spe-

cially pleaded it. Any matter of excuse or in mitigation of damages must be specially pleaded by the respondent in order to be of any benefit or avail to it, and as we have already shown, the bills of lading are not entitled to be read into the record, being only a fragment of the proof offered in the District Court, and being offered for the special purpose of showing receipt of goods by respondent at Philadelphia, in good order and condition.

We also desire to again call the Court's attention, (this Court now sitting as a Court of Error in this case), to the assignments of error, p. 21-26. There is no assignment of error in regard to the increase of the damages claimed in the libel, and it is now too late to urge that as a ground of reversal.

Admiralty Rule 29 provides: "If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the Court, the Court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the Court shall proceed to hear the cause *ex parte*, and *adjudge therein as to law and justice shall appertain.*"

Now, the respondent having appeared in the cause and filed its stipulation, had submitted itself to the jurisdiction of the Court, and upon the proof offered it cannot be doubted that the Court had the power to render a decree for a less amount than was claimed in the libel, if the proof failed to show the full amount of damages; on the other hand, there would seem to be no doubt if the proof showed a greater amount of damage (the

cause of action not having been changed), than was alleged in the libel, upon motion to make the allegation of damage conform to the proof, would have like power to amend the libel and render judgment for the amount of damage the proof showed the libelant had sustained. We therefore contend that the amount and rule of damage, like the matters excusing non-performance of the contract of affreightment were matters of defense, and the burden was on respondent to introduce by proper allegations in its answer, any matters which tended to mitigate or lessen the amount of damage claimed by libelant, and having failed to do so, and it not appearing from the record that any error was committed by the Court below, it is too late for the respondent to have the matter now considered.

We also claim that the question of insurance has no relation or bearing upon the question before this Court, which is simply one of jurisdiction.

POINTS AND AUTHORITIES.

I.

The Trial Court had power to amend the libel in respect to the amount of damage alleged.

U. S. Revised Statutes Sec. 954.

Admiralty Rule 29.

McDonald v. Nebraska 101 Fed. 171, 176-178.

Stockton v. Bishop, 4 How. 155-168.

Parks v. Turner 12 How. 39-46.

Tilton v. Cofield, 93 U. S. 163-166.

Bamberger v. Terry 103 U. S. 40-43.

Hardin v. Boyd, 113 U. S. 756-761.

II.

Error not assigned will not be considered in this Court.

Bell v. Union Pac. R. Co., 194 Fed. 366.

Toledo, etc., R. Co. v. Hove, 191 Fed. 776-781.

III

If this Court should hold that it was error to amend the libel in respect to damages, the judgment should not be reversed, but the Court below directed to enter judgment in accordance with the prayer of the original libel.

Mobile & M. Ry. Co. v. Jurey III U. S. 584-596.

Pacific Postal Telegraph & Cable Co. vs. Fleischer, 66 Fed. 899, 900. (Circuit Court of Appeals, Ninth Circuit).

IV.

Even if the libel had alleged a contract to procure insurance, it would not have ousted admiralty of jurisdiction.

Rosenthal v. The Louisiana 37 Fed. 264.

The Oceano, 148 Fed. 131-132.

Kaiser vs. Blue Star Steamship Co., 91 Fed. 267, 270-271.

Nash v. Bohlen, 167 Fed. 427.

V.

The measure of damages in an action against a common carrier for loss of goods in transit is their value at point of destination with legal interest.

Mobile & M. Ry. Co. vs. Jurey III U. S. 584.

I.

The Trial Court had power to amend the libel in respect to the amount of damage alleged.

As to the power of the Court to amend, we draw Your Honor's attention to the opinion of Judge Caldwell in McDonald vs. Nebraska, supra, on p. 176, 177, 178 and 182 of the Opinion. He says at p. 182:

“What is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded.”

In the case at bar, there was no change in the cause of action. The amendment would have been allowed as a matter of course upon the trial in case of a contest. Where unliquidated damages are sought to be proved, the *ad damnum* may be increased either before proof is offered, or after proof is in, to make it conform to the proof.

As Judge Caldwell says in the case cited (p. 177): “Under Sec. 954 of the Revised Statutes, the right of amendment extends to the ‘sumomns, writ, declaration, return, judgment and other proceedings in civil causes in any court of the United States,’ and may be exercised at any stage of the case, even after trial and judgment.”

The cases cited by counsel for appellant on p. 29 do not support his contention.

Ruth vs. Smith, 68 Pac. 268 (Col.).

Under the Colorado statute judgment cannot be rendered on default for more than is demanded in the complaint, and in the case cited, the judgment was rendered for more than was claimed in the complaint, and no proof was taken to sustain the judgment.

Russell vs. Shurtliff, 65 Pac. 27 (Col.)

No proof was taken in that case on the default, and the complaint showed that only a several judgment could be entered, and the judgment entered was joint, and it was held the Court had no jurisdiction to render a judgment for different relief than the complaint demanded.

Seltzer vs. Davenport Co., 49 Atl. 852. (Conn.)

The complaint alleged negligence in not furnishing safe machinery and the proof taken on the default showed that the machinery was safe, but that the plaintiff had not been properly warned, and the Court held that for negligence not charged in the complaint no substantial damages could be awarded.

Johnson vs. Matz, 27 N. W. 467 (Iowa.)

An unliquidated amount was alleged to be due, and judgment was entered for a fixed amount, with no proof taken to support it.

In *Ohio Central Railway Co. vs. Central Trust Co.*, 133 U. S. 83, the principal of certain railroad bonds was decreed to be due but the bill contained no averments, nor did the record show that they were in fact due, and

at p. 91 the Court said, after quoting from *Thompson vs. Wooster* (114 U. S. 104): "If the allegations are distinct and positive they may be taken as true without proof, but if they are indefinite, or the demand of the complaint is in its nature uncertain, the requisite certainty must be afforded by proof."

In *Thompson vs. Wooster*, 114 U. S., at p. 111, Justice Bradley quotes with approval the statement made in *Williams vs. Corwin*, Hopkins Ch. 471:

"When the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complaint is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of the details, the obligation to furnish proofs rests on the complainant."

In *Davis vs. Speiden*, 104 U. S. 83, the facts are not stated, but the Court says, p. 83:

"We think with the Court below that on the merits it presents a case for reversal, because the averments in the original bill were not sufficiently precise and definite to warrant a decree such as was rendered, *without proof*."

The point decided, however, was whether a bill of review should be dismissed because the decree had not been performed.

U. S. v. 650 Cases Tomato Catsup, 166 Fed. 773.

The Court says at p. 775:

“Though the claimant has not answered or contested the allegations of the libel, so that it may be taken pro confesso, yet it is the duty of the Court, before entering a decree of condemnation in spite of such confession by default, to see that a case is made out.”

The Court cited the 29th Admiralty Rule, *Thompson vs. Wooster* and *Ohio Central Railway Co. vs. Central Trust Co.* The allegations of the libel not being sufficient to make out a case without proof, the case was held for hearing in support of the libel; thus impliedly holding as contended by counsel for appellee, that the Court may, upon the hearing, render such decree “as to law and justice shall appertain.”

In *Confiscation Cases* 20 Wall, 92, cited by counsel for appellee on another point, the Court says at p. 108:

“To a citation or monition founded on the information, default was made. What the effect of this default was we do not propose now to discuss at length. We have gone over the ground recently in the case of *Miller vs. U. S.* (11 Wall. 268), and to that case we refer. In view of what was said there and decided, and in view of the authorities cited, it must be held that the default established the truth of all the material averments in the information, and among others that there had been an executive seizure before the information was filed. It was equivalent in effect to a confession. Now, while it is true, a party cannot, by consent, confer jurisdiction where none would exist without it, it is equally true that when jurisdiction depends upon the existence of a fact, its existence may be shown as well by the confession of a party as by any other evidence.”

Again, at p. 110:

"An information was filed, called a libel of information it is true, but still an information, a citation as well as a monition was issued, a default was taken and after consideration of the evidence condemnation was adjudged. * * * * What matters it then that the information was called a libel of information, or that the warrant and citation is called a monition? The substance and all the requisites of a common-law proceeding are found in the record. Technical niceties are not required in admiralty or revenue cases."

Again, at p. 112:

"The Court did proceed to hear and determine the case after the default was entered. And it was not until after such hearing and consideration that the property was condemned. This appears by the record. Having heard and considered evidence, it must be presumed the Court found that the property belonged to a person engaged in the rebellion, or one who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment. This is a presumption always made in support of judgments of courts after their jurisdiction is made to appear. No rule of law required the District Court to state in detail in its record its findings of fact, and no such practice has prevailed in any Court, except some which are both of limited and inferior jurisdiction. *Nor is it to be considered in a Court of error whether the evidence was sufficient to warrant the findings presumed to have been made, and without which the judgment could not have been given. A less degree of evidence is certainly needed after a default.*"

II.

Error not assigned will not be considered.

Bell v. Union Pac. R. Co., 194 Fed. 366. (Circuit Court of Appeals, Eighth Circuit).

Lays dawn the rule in the syllabus as follows: "Assignments of error cannot be reviewed where they call in question certain alleged erroneous holdings not shown by the record."

Toledo Etc. R. Co. v. Howe, 191 Fed. 776. (Circuit Court of Appeals, Sixth Circuit).

The Court says at p. 781: "The Circuit Court of Appeals for the Seventh Circuit, in applying Rule Eleven of Circuit Courts of Appeal, disregarded assignments of error that the judgment was contrary to the law and contrary to the evidence, because they did not specify wherein the judgment was contrary to the law and contrary to the evidence."

The questions sought to be raised in appellant's supplemental brief regarding the amount and measure of damages, the amendment of the libel to conform to the proof, the insurance and certain clauses in the bill of lading, nowhere appear in appellant's assignment of error and should not be considered by this Court sitting as a court of error, which it must do in this case because the evidence is not before it, and therefore the cause cannot be tried de novo but only upon error assigned which appears upon the face of the record.

III.

In any event the judgment should not be reversed, but the Court below should be directed to enter judgment for the smaller amount.

In Pacific Postal Telegraph & Cable Co. v. Fleischer, 66 Fed. 899, the Court says, at p. 910:

“As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto and sending the cause back for new trial. In such cases the Court may direct the Circuit Court to enter such judgment as should have been entered under the pleadings and findings.”

It is true in this case that the Court said it would have been improper to give judgment for more damages than were demanded in the complaint, but it must be borne in mind that the case cited was a law case, and under the Statute the practice of the State Courts are to be followed, and it must also be borne in mind that in the case at bar, a motion was made to amend the libel to conform to the proof.

In *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, the Court says at p. 596:

“Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error.” Citing *Lincoln v. Claflin*, 7 Wall. 132.

IV.

As to the statement in the libel in regard to insurance being sufficient to oust the Court of jurisdiction, we call attention to *Rosenthal vs. The Louisiana, Supra*, where the Court said at p. 265:

“As to jurisdiction there seems to be no doubt. As the main contract (and the basis of the ship’s liability) is a maritime contract, the additional stipulation as to insurance while the goods lay on the wharf cannot oust the jurisdiction.”

In this case the District Judge found that there was a contract by which respondent agreed to insure the goods.

In *The Oceano*, 148 Fed. 131, cited by appellants in their brief, Judge Hough says at p. 132:

“Whether the settlement at Kobe be regarded as an overpayment by libelant, or an underpayment by the claimant, the fact remains that the claimant procured an advance of its chartered freight, promised by its charter party to repay it, and has persistently refused to do so. In my opinion, therefore, this is really a cause of affreightment, and admiralty has jurisdiction of all contracts of affreightment though the damages may be in any case somewhat indirect.”

The counsel for claimant objected to the jurisdiction, claiming that the libelant was suing for money had and received. The Court, however, upheld the jurisdiction.

Nor is the case of *Turner vs. Beacham*, Fed. Cases 14,252, cited by appellant, in point. This was a libel for services and materials furnished in building a vessel, mingled with a contract to become a partner in the company to purchase the vessel after it was built. The answer set up the contract, showing the two things to be intermingled, and manifestly the court of admiralty had no jurisdiction, but it was a case for equity.

Keyser v. Blue Star Steamship Co., 91 Fed. 267.
(Circuit Court of Appeals, Fifth Circuit.)

In this case the objection was made that it was not within admiralty jurisdiction. The Court says at p. 271:

'The answer shows that almost if not all of the foreign trade at the port of Pensacola is in timber and lumber, by chartered foreign vessels, with reference to which business foreign exchanges are almost exclusively made, and made by means of master's drafts payable to their own order, and signed and endorsed by them, on the owners of their vessels or buyers of the cargo, which are given and received at the rate at the time current; and, there being no market for them at Pensacola, they are sent on for collection. Such being the case, it may very well be that the libelant would have refused to charter the ship except upon the condition that the charterer would make and agree to observe stipulation 7, as expressed in the charter party. It is true that the mere fact of this agreement being embraced in the charter party would not of itself give it the character of a maritime contract; but its relation to the other stipulations of the charter party may be such (and, we think, appears to be such) as to connect it with the contract into which the parties were entering, a contract of an undisputed maritime character, and in such a manner as to authorize the parties to apply to a court of admiralty to inquire into any alleged breaches of this stipulation." Citing *Insurance Co. vs. Dunham*, 11 Wall. 1-36.

Nash vs. Bohlen, 167 Fed. 427.

Held That an agreement by a carrier to insure cargo where it is one of the elements of a properly maritime contract of affreightment, may be proved in admiralty and damages recovered for its breach in a suit for other breaches in the contract.

V.

The measure of damages in an action against a common-carrier for loss of goods in transit is their value at point of destination with legal interest.

Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584.

The Court at p. 596 lays down the rule as stated.

Therefore, the libel correctly specified the measure of damages in Article VI of the libel.

The case cited is also instructive upon the point that the contract is not necessarily embraced in the bill of lading issued by the carrier, where another contract is proved, either writter or oral.

Therefore, upon the authorities cited, we contend that the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

J9SSE STEARNS,

JOHN H. HALL,

Counsel for Appellee.

No. 2133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALIFORNIA-ATLANTIC STEAMSHIP
COMPANY (a corporation),

Appellant,

VS.

CENTRAL DOOR & LUMBER COMPANY
(a corporation),

Appellee.

APPELLANT'S REPLY BRIEF*

I.

Jurisdiction is not Presumed on Appeal to Support the Decree. On the Contrary, Absence of Jurisdiction is Presumed.

Appellee argues at page 9 of his opening brief, as follows:

“The decree having been taken pro confesso the presumption is that all the facts necessary to warrant the decree have been properly found, *IF they are substantially averred in the libel.*”

*In this case appellant has filed three briefs, its original, a supplemental (green) brief, and this reply to appellee's two briefs —“opening” and “reply”.

While this unqualified statement is too broad, we are willing to admit it true for purposes of argument. But it gains our opponent nothing. The very question at issue is: Were the jurisdictional "facts substantially averred in the libel"?

As we have pointed out in our supplemental brief, at page 22, the federal courts of appeal will not only not presume jurisdiction for the decree, but, on the contrary, will presume it does not exist and raise the question on their own motion if not suggested in the assignments of error or argument of counsel.

II.

Inferences of Jurisdictional Facts From Other Facts Pleased Are Not Sufficient to Confer Jurisdiction.

It is of course apparent that jurisdiction to take the *default* in this case must appear in the libel. That is to say, anything shown at the hearing *after* the default and in the absence of the defaulted party, cannot then *create* a jurisdiction. The decree *pro confesso* is only for so much as is in the libel. The defaulting party *confesses* nothing not there pleaded. And this is a *fortiori* true of jurisdictional matters.

U. S. v. Tomato Catsup, 166 Fed. 773;

Ohio Cent. Ry. Co. v. Central Trust Co., 133
U. S. 83;

Thompson v. Wooster, 114 U. S. 104;

Wong Him v. Callahan, 119 Fed. 381.

It therefore follows that in determining the jurisdictional questions here involved, the proofs taken are not before the court. If the court had no jurisdiction for the default, it could not have a hearing and what transpired at any form of hearing is of no avail. And likewise, a failure to bring up the evidence would not raise any presumption of *jurisdictional* fact to support the decree. It is to the libel alone that we must look to determine the court's jurisdiction.

The libel avers that the goods were "to be transported in said steamer and connecting lines and steamers to Portland, Oregon". "That libelant's loss was occasioned solely by the negligence and misconduct of the respondent, its employees, agents or servants."

There is nothing in the libel to show these "connecting lines" were not in fact run by respondent. And even if the court were to take judicial notice that there is only one railroad across the Isthmus and further, that that one road is run by the Panama Railroad Company, a private corporation, in which the United States Government owns a large block of stock—even if the court could go this far, it could not take judicial notice that the Panama Railroad Company was not the "*agent*" or "*employee*" of the respondent in carrying over the connecting line.

As the libel does not show *affirmatively* that these agents and employees whose negligence caused these injuries were not *land* agents, or that their negligence

was not on land, the jurisdiction does not appear, and the decree cannot stand.

But let us go further, let us even suppose that the court will take judicial notice (against the facts, as we understand them) that the Panama Railroad Company had no arrangement with appellant by which it became its agent or employee to carry over the "connecting lines", across the Isthmus, but that on the contrary, it carried as a separate carrier, as an independent contractor. Can the court take further judicial notice that the appellant itself did not stow the goods in the cars of the railroad at Ancon, or break bulk and take the goods at Balboa, and that the negligent acts of stowage and handling occurred during these incidents to the land carriage?

In determining whether the libel shows jurisdiction, the presumption, according to the Supreme Court, is the contrary. It will presume *against* the jurisdiction that after the goods were in the cars the "connecting" carrier carried as the agent or employee of appellant, and that the negligence occurred on land, rather than on shipboard.

The appellee urges that the court will infer that where there are connecting carriers, the *last* carrier is responsible. This may or may not be true, but it is no warrant for the proposition that the *last carrier* and the *last instrument* of carriage are the same. So far as the libel shows, there is but one carrier, who is to carry by steamer and then by connecting lines and steamers from Philadelphia to the Isthmus, across the Isthmus to the Pacific, and thence to Portland.

However, even if this were the proper inference for the court to make, it does not take the *place of the averment of jurisdictional facts* themselves as to the locus of the tort, or, if a case of contract, as to the part of the contract which was broken. The court cannot infer the jurisdictional facts from other facts not in themselves stating the jurisdiction.

Chief Justice Marshall states the proposition in the following words:

“The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration *shall state expressly the fact on which jurisdiction depends*. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.”

Brown v. Keene, 8 Pet. 112, 115;

Robertson v. Cease, 97 U. S. 646 at 649.

“The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. *Ex parte Smith*, 94 U. S. 455 (24:165); *Metcalf v. Watertown*, 128 U. S. 586 (32:543). The general averment in this bill that ‘the amount or value in controversy in this suit exceeds the sum of \$2000, exclusive of interest and costs’ was a mere conclusion and that it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach \$2000.”

Fishback v. Western Union Tel. Co., 161 U. S.

It is therefore submitted that the appeal must be sustained as the libel does not state facts showing admiralty jurisdiction.

III.

Appellee Has Sought the Wrong Tribunal.

Appellee claims that, as the goods were in the possession of the appellant, it cannot tell where the alleged negligence occurred, and seems to seek sympathy on this account.

This claim is simply an admission that it has chosen the wrong tribunal. It is asking relief in admiralty, in a court of limited jurisdiction, with the frank statement that it does not know whether the facts bring it within those limits.

This appeal might have more weight if there were no federal or state common law courts having jurisdiction of the entire transit of the goods, whether by land or water.

In this connection, it should be noted that the presumptions *against* federal jurisdiction apply *a fortiori* in admiralty where the defendant is not only deprived of its right to defend in the state courts, but is also deprived of its right of trial by jury.

IV.

The Carriage Across the Isthmus is a Substantial Land Journey in so far as Concerns Loading, Stowing, Handling and Carrying.

This point was not seriously opposed at the hearing, but it may be as well to point out that the trip from Blanco to Moss Landing held a land carriage though joined to a sea carriage in the case of *Pac. Coast SS. Co. v. Ferguson*, 76 Fed. 993, was less than 25 miles.

Would the court have awarded a decree for the libelant in that case if the water carriage instead of being from Moss Landing to San Diego, had been to Liverpool, around the Horn?

Would the locus of the tort of negligent stowage in the cars at Blanco have been any more maritime because the subsequent voyage at sea was 8,000 miles instead of 400?

Counsel has cited the case of *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 Howard 344, in which it affirmatively appears that the damage to the goods occurred on Long Island Sound, that is on tide waters. This decision is authority for the proposition that admiralty will take jurisdiction of a breach of that portion of the contract of affreightment which is upon the high seas, but is in no sense an authority for the assumption of jurisdiction over a breach of contract for a carriage by railroad over land as part of the total through journey.

This case was decided before the case of the *Genessee Chief*, 12 Howard 443, and during the period when the federal courts were seeking some excuse to break down their earlier holding that they would not take jurisdiction of water carriage above the action of the tide. The want of logic in these earlier cases is discussed and the question finally disposed of in the *Genessee Chief*, where the Supreme Court assumes jurisdiction of torts in navigable waters above tidal action.

Counsel has clearly misunderstood the language in *The New England*, 110 Fed. 415. In that case the goods were delivered to the Steamship Company at its dock, alongside its steamer, lying in the port of Boston, and the contract was to deliver them at Liverpool, Great Britain. The possession alongside the vessel is a maritime possession, incidental to its carriage in the vessel. It is true that the custody agreed on was at and from Boston, in the jurisdiction of Massachusetts, across the sea to Liverpool, in the British Dominions, but it was all a maritime custody, whether at the port of Boston or the port of Liverpool.

Bulkley v. Naumkeag etc. Co., 24 How. 386.

We have not been able to discover a case in any court in which it has been held that admiralty had jurisdiction for the *breach* of a contract to *carry* on a railroad, on *land*, where the contract also agreed to carry over water, and we confidently assert that there is nothing in the books that even remotely disagrees from the doctrine *laid down in this court in Pac. Coast SS. Co. v.*

Ferguson, or by the Seventh Circuit in the *Richard Winslow*, 71 Fed. 426.

As the libel is cast in tort, these cases on contracts of affreightment have no application in any event.

V.

In View of the Clerk's Certificate, the Apostles Must Be Deemed to Show all the Proceedings at the Hearing on Default.

We have before shown that jurisdiction for the default must appear from the libel at the time default is taken, and that it cannot be created by evidence or amendments taken thereafter. The proceedings at the hearing are, however, pertinent to show other errors in the decree.

Even if the evidence at the hearing could create the jurisdiction, the apostles show that no evidence was offered as to the locus of the negligence, but, on the contrary, it shows an agreement to carry by railroad for a long way before arriving at Philadelphia. The clerk has certified a "true transcript of the record *and* proceedings in said cause" * * * "which embraces all the proceedings" (Apostles p. 28). He certifies that the bills of lading and letters (libelant exhibits, 1 to 9) were offered in proof by libelant and admitted in evidence by the court at the hearing of the above entitled cause (Apostles p. 39).

The true transcript of the record embracing *all* the “proceedings” at the hearing, thus shows that the *only evidence offered* was the bills of lading and the letters. None of these show the locus of the negligence.

The record shows no limitation of the purpose for which the bills were introduced. Counsel contends that they were for the purpose of substantiating the libel’s averment that they were received by the steamer “Mills” at Philadelphia. This cannot be so, however, as they show receipt of the goods by railroad at Toledo, Ohio, Maurer, N. J., York, Pennsylvania, and the Panama Railroad Company at New York. Only one (Exhibit 6) shows a receipt of a part of the goods at Philadelphia, and that does not show that the goods were received by the steamship “Mills”.

It is not for us to speculate what the libelant had in mind when it put them in evidence, but in any event they show:

(1) That if they were received by respondent at these inland points, the transportation was not maritime at its inception, as well as at Panama, and

(2) That the goods were received under an agreement that the damages for which the carrier became liable were to be limited to the value at the place of shipment.

Supplementary Brief, (Green Cover) pp. 26, 27.

It is elemental that if the proofs at the hearing *on default* contradict the libel, judgment will not be entered for the libelant.

The libel alleges valuation for damages at Portland, the proofs show an agreement for damages based on the place of shipment, i. e., in Ohio, New Jersey, Pennsylvania and New York. One cannot recover damages on a contract by showing of values at a place so distant and a time so remote from that agreed upon.

That the bill of lading may be at once a receipt and contract has been many times decided.

Pollard v. Vinton, 105 U. S. 7;

Iron Mountain Ry. v. Knight, 122 U. S. 79, at p. 87.

That the bill given by the original carrier (as here those railroads at these inland points) governs the carriage as to subsequent carriers (as here the California-Atlantic Steamship Company from Philadelphia to Portland) has been recently held by this court in the First Circuit.

Cobb v. Brown, 193 Fed. 958.

That when the court sits in a default case it calls for the highest good faith on the part of those seeking to gain a decree against an absent litigant, needs no emphasis. The rule is plain, the court must "adjudge as to law and justice shall appertain". It would be a mockery of justice to allow this decree to stand in the face of the proof offered by libellant itself that the court had before it no measure of damages under the contract under which the goods were shipped.

It further appears that the damages are unliquidated. Evidence is required to show their amount, and a mere

allegation in the complaint will not sustain the judgment on appeal.

Raymond v. Danbury Co., 20 Fed. Cases 332;

U. S. v. White, 28 Fed. Cases 588.

It is therefore submitted that no damages are shown at all on which to base the decree.

VI.

The Failure to Procure Insurance for the Goods on a Trip Across the Isthmus or to Repay Premiums.

Whatever may be said about the allegations of an agreement to insure, there is in the libel a clear cause of action for failure to return insurance premiums. The libels aver the receipt of the moneys by the respondent, the failure to insure, and includes the amount of the premiums in its claim for damages.

The claim of the libellant in this court that its intention in setting out this cause of action *to insure* so fully was merely to show negligence in performing an agreement *to carry*, displays a *naiveté* that is admirable. At any rate, it did not succeed in embodying its intent in the libel and if it had it would have been bad pleading even in admiralty. It is a safe wager also that if there were any other evidence taken at the hearing, it included the amount of the premiums.

There is nowhere any allegation in the libel that this insurance was for the *marine part* of the voyage only.

It may well have been and probably was, an agreement covering risks of carriage across the Isthmus. Now, a premium for insurance that is both non-maritime and maritime cannot be recovered in admiralty. All the authorities we have before cited on the other jurisdictional questions sustain this proposition.

No case is clearer than the *Pacific Coast SS. Co. v. Ferguson*, where this court, in comment on the *Richard Winslow* presupposes the exact case here presented.

“The court dismissed the libel, upon the ground that the portion of the contract which provided for storage after the arrival of the vessel at her port of destination was not maritime, and was not cognizable in the admiralty. In that case the consideration was not apportioned to the two services which were to be rendered by the vessel. It was entire. *It is directly deducible, from the conclusions arrived at by both the courts, that, had the libel been brought by the owners of the vessel to recover the freight money under the contract, it would have been dismissed for want of jurisdiction, upon the ground that it was not based wholly upon a maritime contract.* A similar doctrine was applied in *The Pulaski*, 33 Fed. 383; *The Murphy Tugs*, 28 Fed. 429.”

Pacific Coast SS. Co. v. Ferguson, 76 Fed. 993, at 996.

So here the court should have dismissed the libel for the insurance premiums on the ground that they were paid for an insurance policy not “wholly maritime” in character. As the premiums are inseparably bound up in the other damages, no jurisdiction existed for the default.

In none of the three cases cited on the point at pp. 13, 14 and 15 of its brief, *Rosenthal v. The Louisiana, Keyser v. Steamship Co.* and *Nash v. Bohlen*, was the insurance to cover a joint land and water journey.

It may be well to comment again on the fact that as the question of the insurance is one of jurisdiction, it need not be raised by the assignments of error (p. 22, green brief).

VII.

Even if the Contracts Had Been for Marine Insurance Only, the Question Whether the Contract was to Insure or Merely to Procure Insurance Must be Resolved Against the Jurisdiction.

Counsel urges that the portions of the libel referring to the insurance may have meant that the California-Atlantic Steamship Company was to become the insurer instead of procuring policies from some insurance company. It is hardly likely that a separate premium would be paid the California-Atlantic Steamship Company for insurance when, as our opponent claims, they were already liable as insurers as common carriers.

However, if the libel is ambiguous on this point, the presumption in United States courts is that the court did not have jurisdiction and the ambiguity must be resolved in favor of the proposition that the contract was to procure insurance from other companies. This is a non-maritime contract. See authorities at pages 22 et seq. of green brief.

The case of *Rosenthal v. The Louisiana*, 37 Fed. 264, cited by our opponent, is clearly distinguishable. In that case the court finds jurisdiction solely on the ground that the contract was a single contract with the insurance agreement but one of its subordinate promises. In the case at bar, the insurance transaction was a separate one, for which premiums were paid, while the contract of affreightment had its own consideration in the form of freight. Besides the damage alleged in that case was not for breach of the contract to insure while here it was.

The case of *The Oceano*, 148 Fed. 131, is in no wise pertinent. It holds that an overpayment of freight moneys for a maritime carriage warrants a suit in admiralty. It certainly does not overrule those cases which hold that an agreement *to procure* insurance policies is not a maritime contract.

In *Nash v. Bohlen*, 167 Fed. 427, the court squarely says that even the contract to procure *marine* insurance is not by itself of maritime cognizance and becomes so only by virtue of its being bound up with the other stipulations of a charter party. Here the contracts are averred as separate, there is no interdependent consideration and the blending is only in the averment for damages on which the decree is based.

VIII.

The Amendment of the Libel Opens the Default. With the Default Opened, no Decree Could be Rendered in Respondent's Absence.

The decree is based on an amended libel, to which the respondent had no opportunity to plead.

There could be no plainer error—nor one having less need of assignment. One cannot read the decree without seeing it.

We have already cited many cases to the effect that a default only confirms what is properly pleaded. This point is entirely different. It is that the amendment of the libel *after* default *sets it aside*, and allows respondent an opportunity to answer it. There being no default, the court had no power, *without a trial*, to enter a judgment.

As is said by *Daniels' Chancery*:

“The amendment of the bill, even for the purpose of rectifying a clerical error, renders a previous order to take the bill *pro confesso* inoperative”

unless the defendant is in contempt for not answering and notice of the motion to amend has been given personally to him.

Daniels' Chancery, §426;

Gibson v. Reese, 50 Ill. 383;

Harris v. Dietrich, 29 Mich. 306;

Albright v. Texas, 8 N. Mex. 422.

That an amendment which increases the amount for which the respondent is liable goes to the essence needs

no argument. A respondent may well say "I'll stand for so much but if it is for any more I'll defend." Many courts have held that such essential amendments reopen the default.

Thompson v. Johnson, 60 Cal. 292;

Witter v. Bachman, 117 Cal. 318;

Adkins v. Faulkner, 11 Ia. 326;

Cook v. Woodbury Co., 13 Ia. 21.

It is urged by counsel that the court should simply reverse the decree and award the amount originally prayed for. We submit that counsel comes too late. *He has already amended* his libel. The old libel on which the default was entered is no longer before the court. The amended one has taken its place. We have not had an opportunity to plead to it and we should be heard.

Respectfully submitted,

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WILLIAM DENMAN,

Proctors for Appellant.

DENMAN AND ARNOLD,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WILL JORGENSEN,

Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of
the State of California,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

FILED

APR 23 1912

No. 2121

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WILL JORGENSEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Praeipie Regarding Printing of Record.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

J. C. WILL JORGENSEN,
Plaintiff in Error,
vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

To the Clerk of said Court:

You are hereby requested to omit from the transcript of the record, in printing the same, the following papers:

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as provided for in the stipulation of counsel, this day filed, and to include in said transcript of the record

to be printed by you the following papers in entirety and which includes everything not included in the above:

Amended Answer.

Assignment of Errors.

Bill of Exceptions.

Bond on Writ of Error.

Complaint.

Clerk's Certificate to Judgment-roll.

Clerk's Certificate to Record on Appeal.

Citation.

Demurrer.

Judgment.

Order Overruling Demurrer.

Order Allowing Defendant to File Second Amended Answer.

Order Allowing Writ of Error.

Petition for Writ of Error.

Second Amended Answer.

Writ of Error.

Respectfully,

F. J. SOLINSKY,

FRANK R. WEHE,

Attorneys for Plaintiff in Error.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. No. 2121. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, a Municipal Corporation of the State of California, Defendant in Error. Notice. Filed Mar. 27, 1912. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

J. C. WILL JORGENSEN,

Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,

Defendant in Error.

Stipulation [Under Rule 23].

IT IS HEREBY STIPULATED by and between
the parties to the above-entitled action that in print-
ing the record in said action, the Clerk shall not be
required to print the following papers:

Answer.

Summons and

Stipulation.

Dated this 26th day of March, 1912.

F. J. SOLINSKY,

FRANK R. WEHE,

Attorneys for Plaintiff in Error.

J. C. CAMPBELL,

R. HARDIN,

Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court
of Appeals for the Ninth Circuit. No. 2121. J. C.
Will Jorgensen, Plaintiff in Error, vs. County of
Tuolumne, a Municipal Corporation of the State of
California, Defendant in Error. Stipulation.
Filed Mar. 27, 1912. F. D. Monckton, Clerk.

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,

Defendant.

Complaint.

Now comes said plaintiff and complaining of said defendant for cause of action alleges:

I.

That at and during all the times hereinafter mentioned one H. H. Will Jorgensen and the plaintiff, J. C. Will Jorgensen, and each of them, were, and still and now are, alien residents of said district and State, and subjects and citizens of the King and Kingdom of Denmark.

II.

That at and during all of the times hereinafter mentioned the said H. H. Will Jorgensen and J. C. Will Jorgensen were, and they still and now are, co-partners, doing a general contracting business in the City and County of San Francisco, State of California, under the firm name and style of Jorgensen Bros.

III.

That at and during all of the times hereinafter mentioned the defendant, County of Tuolumne, was,

and still and now is, a municipal corporation of the State of California, and one of the duly created and constituted counties of said state, and acting as such. [1*]

IV.

That the Stanislaus River, hereinafter mentioned, at and during all of said times was, and still and now is, a natural watercourse forming and being the dividing line and boundary between the defendant, County of Tuolumne, and the County of Calaveras, an adjoining county and municipal corporation in and of said State, situated on the north side of said river.

V.

That said H. H. Will Jorgensen and the plaintiff, J. C. Will Jorgensen, as copartners as aforesaid, and within the two years last past, constructed and erected a concrete bridge across said Stanislaus River for the defendant under a written contract made between them as such copartners and the defendant for the construction and erection of such bridge, and that they performed work and labor, and furnished materials, for said defendant, at its special instance and request, in the construction and erection of one of the piers of said bridge located in said river, in addition to the work, labor and material in that regard in said contract contained, stipulated or provided for, of the fair and reasonable value of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States.

*Page-number appearing at foot of page of original certified Record.

VI.

That heretofore, and within one year after the last of said work and labor was performed, and materials were furnished, as aforesaid, the said Jorgensen Bros., said copartners, duly prepared, filed and presented to the Board of Supervisors of said County of Tuolumne, for allowance, all in conformity with and as required by the law and statute of the State of California in and for such case made and provided, their written claim, account or demand for said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, for and on account of said [2] additional work, labor and materials, in the manner and form, and verified, as prescribed by law, which said claim or demand was then and there, and before such presentation and filing, approved by the officer or agent of the defendant who directed such expenditure and was in charge and supervision for said defendant of said work, to wit: N. J. Pickle, County Surveyor of said County, and demanded that the same be allowed and ordered paid; but that the said Board of Supervisors has heretofore, to wit, on the 23d day of February, 1910, rejected said claim and demand, and ever since has refused and now refuses to pay or allow the same.

VII.

That said Jorgensen Bros., said copartners, prior to the commencement of this action in writing and for value duly assigned, transferred and set over all of their said claim and demand, and all moneys payable or owing on account thereof, to this plaintiff, who is now the owner and holder thereof.

VIII.

That no part of said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars has ever been paid, and that the whole thereof is now due, owing and unpaid from said defendant to the plaintiff.

And for a further and separate cause of action, and further complaining of said defendant, the plaintiff alleges:

I, II, III and IV.

The plaintiff hereby and herein expressly refers to and repeats as and for paragraphs I, II, III and IV of this count or cause of action the paragraphs numbered I, II, III and IV in the first count or cause of action of this complaint contained, and all and singular the allegations stated therein, and makes the same part hereof in like manner as if herein expressly set forth. [3]

V.

That on the 8th day of September, 1908, said Jorgensen Bros., said copartners, entered into a written contract with the defendant for the construction of a reinforced concrete bridge for the defendant across the Stanislaus River at Melones, on the road from Sonora, Tuolumne County, to Angels Camp, Calaveras County, whereby they, in consideration of the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars, and the further sum of \$4.00 per cubic yard for stone retaining wall, and the further sum of \$0.35 per cubic yard for any fill required, to be paid to them by the defendant in the manner and at the times as in said

contract stated, agreed to construct and perform the said work, and deliver the same to the defendant.

VI.

That prior to the execution of said contract and for the purpose, among others, of enabling bidders for the construction of said bridge to estimate and bid thereon and thereby, the defendant caused to be made by the County Surveyor of said County of Tuolumne, and filed with the County Clerk of said County, certain plans and specifications for said bridge, and the said construction thereof, which said plans and specifications were and are by the express terms of said contract made a part thereof; and said contract in express terms further provided and provides that "said construction, erection and work shall be done and completed in a good and workmanlike manner, according to said plans and specifications."

VII.

Said specifications, filed and made and being a part of said contract, as aforesaid, contained and contain the following language, requirements, items, terms, and provisions, among others, to wit: [4]

"SPECIFICATIONS FOR A REINFORCED
CONCRETE BRIDGE ACROSS THE STAN-
ISLAUS RIVER BETWEEN TUOLUMNE
AND CALAVERAS COUNTIES, NEAR ME-
LONES, CALIFORNIA.

LOCATION.

The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.

The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.

GENERAL DESCRIPTION.

The dimensions of this reinforced concrete bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

The approaches at either end of the concrete bridge will consist of an earth and stone fill of lengths as shown on the profile plan and shall be bid on at a price per cubic yard. Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

FOUNDATIONS.

Are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bedrock. It is assumed that the bedrock on each side of the river will be found at a depth shown on plans. Should it be determined that it is necessary to go to a greater depth than this to reach bedrock this work shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation." [5]

"GENERAL PROVISIONS.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not

mentioned in the specifications, must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure.

All materials and workmanship shall be the best of their several kinds, and all be under the supervision and to the satisfaction of the Board of Supervisors of each County and the Engineer in charge of the work."

Said plans, referred to in said specifications and by express terms made a part thereof, and filed and made and being a part of said contract, as aforesaid, definitely and positively fixed, represented, showed, and indicated, and so fixed, represent, show and indicate the location of the bedrock underlying the bed of said river, and the depth from the surface and from the grade of said bridge, fixed in and by said plans and specifications, to bedrock, at a point or place in and near the middle of said river, where the pier of said bridge in said river was to be placed under and according to said contract, plans, and specifications, and was placed, as hereinafter alleged, at not to exceed twenty-seven feet and six inches from the spring line of the arches in said construction, as shown and fixed by said plans and specifications.

And in this connection the plaintiff alleges that said plans warranted and warrant the location of and depth to bedrock [6] in said river at said point or place, as aforesaid, and represented and represent the same as a fact known to or ascertained by the

maker of said plans and to the defendant, and so as to induce the belief, and the said plans did induce the belief in said Jorgensen Bros., said copartners, and they, at and prior to the time of entering into said contract and making their bid therefor, did believe by reason thereof, that said location of bedrock and depth to bedrock in said river, as fixed, shown and represented in and by said plans, as aforesaid, was known to or previously ascertained by the maker of said plans and the defendant, and to be in fact as so fixed, shown and represented therein and thereby, and as hereinabove alleged.

And the plaintiff further alleges in this connection that said plans were the plans upon which said Jorgensen Bros., said copartners, were invited by the defendant to estimate and make their bid for the construction and performance of said work, and that they bid for and offered to construct and perform said work, as aforesaid, for said sums hereinabove alleged, and that they made and entered into said contract, as aforesaid, solely under the belief, and they were thereunto induced solely by the belief, and by the said plans and representations thereon and therein, that bedrock at said point or place in said river was and would be found at the depth and as fixed and shown in and by said plans, and as hereinabove alleged, and that said plans were drawn, and did represent the said location of said bedrock, and depth to bedrock, in said river at said place or point, according to the actual fact and the actual location of said bedrock, and depth to bedrock, at said place or point in said river.

VII.

That in truth and in fact said plans did not and do not show the actual location of the bedrock, or depth to bedrock, in [7] said river, at said place or point where the pier of said bridge in said river, near the middle thereof, was to be placed and erected under and according to said contract, plans, and specifications, as aforesaid, and was placed and erected, as hereinafter alleged; and the actual location of bedrock and depth to bedrock, in said river, at and near said place or point, was not known to or ascertained by the maker of said plans or the defendant, at or prior to the time of the making and filing of said plans, as aforesaid, or at or prior to the time of entering into said contract with said Jorgensen Bros., said copartners; and the bedrock at said point or place in said river was not located or found at the depth or place fixed, shown and represented, as aforesaid, in and by said plans therefor, but was located and was found at a much greater depth in said river at said point or place, to wit: in excess of twenty-five feet and six inches below the place or depth therefor fixed, represented, shown and indicated in and by said plans; and said plans were negligently and carelessly made, drawn and filed, as aforesaid, by said County Surveyor and the defendant, and in entire ignorance on their part, or on the part of either of them, of the actual location of bedrock, or depth to bedrock, in said river at said place or point; and said plans, in ignorance of and contrary to the said actual facts and conditions, and carelessly and negligently, as aforesaid, erroneously, wrongly and inaccurately fixed, represented, showed and indicated, and so fix, represent,

show and indicate the bedrock, and the depth to bedrock, in said river at and near said point or place, at a depth or place therein and thereat, which was and is more than twenty-five feet and six inches above the bedrock, and the actual location of the bedrock, in said river at and near said point and place.

And the plaintiff alleges in this connection that said [8] Jorgensen Bros., said copartners, were at all times prior to, and up to and at, the time of entering into said contract with the defendant, and for a long time after they had commenced the erection and construction of said bridge thereunder, and without any wrong, fault, or neglect on their part, or on the part of either of them, in entire ignorance of the said error, wrong, or inaccuracy of and in said plans, and of the fact that the bedrock, or depth to bedrock, in said river, at and near said point or place, was located or would be found at a much greater, or any greater, depth than as fixed, represented, shown and indicated in and by said plans, or at all other than as so fixed, represented, shown and indicated.

IX.

That said Jorgensen Bros., said copartners, in good faith commenced and thereafter continued under and according to said contract, plans and specifications, the construction and erection of said bridge. That after they had excavated and dug in the bed of said river, at the point or place in said river where the pier of said bridge in said river was to be placed and erected under and in accordance with said contract, plans and specifications, to the depth or place where bedrock is fixed, represented, shown and

indicated, therein and thereat in and by said plans, as aforesaid, for the purpose of constructing the foundation for said pier and of thoroughly imbedding the same in bedrock, as required and prescribed in and by said specifications, the plaintiffs found and ascertained that there was no bedrock, and there was no bedrock, at said point or place in said river where the same was so fixed, represented, shown and indicated therein and thereat in and by said plans; and the foundation for said pier by reason thereof could not then and there be constructed as shown on said plans, and could not then and there be thoroughly, or at all, imbedded [9] in the bedrock, as so shown and required and prescribed by said specifications, and said contract.

X.

That said contract in express terms further provided and provides that the defendant, or its duly appointed agent or superintendent, should at all times during the progress of said work have free access thereto, and be allowed to examine the same, and if said structure, or any part thereof, should not be in accordance with said plans and specifications, it or he should reject the same, and refuse to accept it. That N. J. Pickle, the County Surveyor of said County of Tuolumne, at all times during the progress of said work and herein mentioned, was and acted as the duly appointed agent and superintendent of the defendant, and was in charge and supervision of said work for the defendant as such under said terms and provisions of said contract. That said N. J. Pickle, as such agent and superin-

tendent, required said Jorgensen Bros., said copartners, to continue their said excavations for the foundation for said pier in said river to bedrock, as required and prescribed by said specifications; and that bedrock at said point or place in said river, where said pier in said river and its foundation was to be placed and constructed under and according to said specifications, was not reached or found by said Jorgensen Bros., said copartners, in their said excavations except at a depth in the bed of said river at such point or place in excess of twenty-five feet and six inches below the depth or place fixed, represented, shown and indicated therefor, in and by said plans.

That by reason thereof, and of the facts herein alleged, and by and through the said wrongful, negligent and careless acts of the defendant, its officers and agents, said Jorgensen Bros., said copartners, were compelled to make excavations and dig in [10] the bed of said river to bedrock at said point or place in said river a distance of more than twenty-five feet and six inches in depth in addition to the depth or distance fixed, represented, shown and indicated in and by said plans as the depth or distance to bedrock in said river at said point or place, and put to great loss and expense, and compelled to do their said work at a largely increased cost by reason thereof.

That by reason of the facts herein alleged, and by and through the said wrongful, careless and negligent acts of the defendant, its officers and agents, said Jorgensen Bros., said copartners, were

also compelled to perform and furnish additional work, labor and materials in the construction and erection of said pier in said river at said point or place, and to extend said pier downward for and to the said additional distance of more than twenty-five feet and six inches to bedrock, where the bedrock was actually reached and found at said point or place, as aforesaid, and put to great loss and expense, and compelled to erect said pier at a largely increased cost by reason thereof. That said additional work performed, and labor and material furnished by them as aforesaid, was or were so performed and furnished, as aforesaid at the fair, reasonable and necessary cost and expense to said Jorgensen Bros., said copartners, of more than Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States, whereby, and by reason of the facts herein alleged, the said Jorgensen Bros., said copartners, were injured and damaged in said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

XI.

That plaintiff hereby and herein expressly refers to and repeats as and for paragraph XI hereof the paragraph numbered VI of the first count or cause of action of this complaint, and all [11] and singular the allegations contained therein, and makes the same part hereof, the same as if herein set out at length.

And the plaintiff alleges that said Jorgensen Bros., said copartners, prior to the commencement of this

action duly assigned, transferred and set over to this plaintiff, in writing and for value, all their said claim and demand, and any and all rights by or on account thereof, and their said cause of action, and in and to said damages, and that the plaintiff is now the owner and holder thereof.

XII.

And the plaintiff further alleges that the defendant has heretofore duly accepted said bridge, and is now using and in control of the same as a free public highway, and has voluntarily accepted and now so retains the benefit of the said additional work, labor and materials, performed, done and furnished by said Jorgensen Bros., said copartners, as aforesaid.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States, together with legal interest thereon at the rate of seven (7) per cent per annum from the 23d day of February, 1910, and for costs of suit.

SOLINSKY & WEHE,
Attorneys for Plaintiff. [12]

State of California,
City and County of San Francisco,—ss.

J. C. Will Jorgensen, being duly sworn, deposes and says: That he is the plaintiff named in the annexed complaint; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information

or belief, and that as to those matters he believes it to be true.

J. C. WILL JORGENSEN.

Subscribed and sworn to before me this 26th day of March, 1910.

[Seal]

D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 29, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [13]

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Demurrer.

Now comes the defendant in the above-entitled action and demurs to the alleged first cause of action in plaintiff's complaint filed in said action, and for grounds of demurrer alleges:

I.

That said alleged first cause of action does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said plaintiff has no capacity to sue.

III.

That said alleged first cause of action is uncertain in this, it is therein alleged that said plaintiff and one H. H. Will Jorgensen are copartners, but it does not appear therefrom that they have complied with the provisions of Section 2466 of the Civil Code of the State of California.

IV.

That said alleged first cause of action is ambiguous on the grounds and for the reason stated in paragraph III hereof.

V.

That said alleged first cause of action is unintelligible on the grounds and for the reason stated in paragraph III hereof. [17]

VI.

That said alleged first cause of action is further uncertain in this: It is alleged in paragraph VI of said complaint that "within one year after the last of said labor was performed, and materials were furnished, as aforesaid, the said Jorgensen Brothers, said copartners, duly prepared, filed and presented to the Board of Supervisors of said County of Tuolumne, for allowance, all in conformity with and as required by the law and statute of the State of California, in and for such case made and provided, their written claim, account and demand for said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars for and on account of said additional work, labor and materials, in the manner and form, and verified, as prescribed by law, but that said Board of Supervisors has heretofore,

to wit, on the 23d day of February, 1910, rejected said claim and demand, and ever since has refused and now refuses to pay or allow the same''; but it does not appear from said allegation in said complaint that said claim and demand presented to the Board of Supervisors of said Tuolumne County was duly, correctly, or at all itemized, giving dates and particular service rendered, character of work done, number of days engaged, character of supplies or materials furnished. Nor does it appear therefrom, whether at the time said alleged claim and demand was presented to the said Board of Supervisors for allowance as aforesaid, that there was sufficient funds or any funds in the treasury of said Tuolumne County legally or otherwise applicable to the payment of said alleged claim and demand, or any part thereof.

VII.

That said alleged first cause of action is ambiguous on the grounds and for the reasons set forth in paragraph VI hereof. [18]

VIII.

That said alleged first cause of action is unintelligible on the grounds and for the reason set forth in paragraph VI hereof.

IX.

That two causes of action are improperly united in said complaint, to wit, an action on an express written contract is improperly joined with an action for damages alleged to **have resulted** from alleged wrongful, careless and negligent acts of said defendant, its officers and agents.

X.

That said first alleged cause of action in said complaint is ambiguous in this, that it cannot be ascertained therefrom what was the nature of the additional work and labor alleged to have been performed or what materials are alleged to have been furnished as set forth in paragraph V thereof, and said alleged first cause of action is further ambiguous in that it does not appear therefrom that said Jorgensens, as copartners, were to or should for any cause become entitled to any compensation in addition to that fixed and specified in the written contract alleged to have been entered into between defendant and the said Jorgensens.

XI.

That said alleged first cause of action is uncertain for the reason set forth in paragraph X herein.

XII.

That said alleged first cause of action is ambiguous in that it cannot be ascertained therefrom what work and labor said copartners were required to perform or what materials said copartners were required to furnish under the terms of said alleged written contract. [19]

XIII.

That said alleged first cause of action is uncertain for the reasons set forth in paragraph XII herein.

XIV.

That said alleged first cause of action is unintelligible for the reasons set forth in paragraph XII herein.

XV.

That said alleged first cause of action is ambiguous in this, that it cannot be ascertained therefrom what portion of said alleged sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars is alleged to be due for additional work and labor, and what portion thereof for materials.

XVI.

That said alleged first cause of action is uncertain for the reasons specified in paragraph XV herein.

And by way of demurrer to the alleged second cause of action in said complaint, defendant specifies as follows:

I.

That said alleged second cause of action does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said plaintiff has no capacity to sue.

III.

That said alleged second cause of action is uncertain in this, it is therein alleged that said plaintiff and one H. H. Will Jorgensen are copartners, but it does not appear therefrom that they have complied with the provisions of Section 2466 of the Civil Code of the State of California.

IV.

That said alleged second cause of action is ambiguous on [20] the grounds and for the reason stated in paragraph III hereof.

V.

That said alleged second cause of action is unin-

telligible on the grounds and for the reason stated in paragraph III hereof.

VI.

That said alleged second cause of action is ambiguous in this, that it cannot be ascertained therefrom how, or in what manner, "said plans warranted and warrant the location of and depth to bedrock in said river at said point or place, as aforesaid," as alleged in paragraph VII of said alleged second cause of action.

VII.

That said alleged second cause of action is unintelligible on the grounds and for the reason stated in paragraph VI hereof.

VIII.

That said alleged second cause of action is uncertain on the grounds and for the reason stated in paragraph VI hereof.

IX.

That said alleged second cause of action is ambiguous in that it cannot be ascertained therefrom what was the exact sum in which said Jorgensen Brothers are alleged to have been injured and damaged by reason of the alleged facts therein set forth.

X.

That said alleged second cause of action is uncertain on the grounds and for the reason set forth in paragraph IX hereof.

XI.

That said alleged second cause of action is ambiguous in that it cannot be ascertained therefrom what was the nature of the alleged additional work and

labor performed and materials furnished. What portion of said alleged sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars is [21] alleged to be due for said alleged additional work and labor performed and what portion thereof for said alleged additional material.

XII.

That said alleged second cause of action is unintelligible on the grounds and for the reason set forth in paragraph XI hereof.

XIII.

That said alleged second cause of action is uncertain on the grounds and for the reason set forth in paragraph XI hereof.

Wherefore the defendant prays that it may be dismissed with judgment for costs incurred.

E. W. HOLLAND,
CAMPBELL, METSON, DREW, OAT-
MAN & MACKENZIE,

Attorneys for Defendant.

Due service of within Demurrer be receipt of a copy thereof is hereby admitted this 2d day of May, 1910.

SOLINSKY & WEHE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[22]

At a stated term, to wit, the July term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday, the 15th day of September, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein heretofore heard and submitted being now fully considered and the Court having rendered its oral opinion thereon, it was ordered, in accordance therewith, that said demurrer be and the same is hereby overruled. [23]

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Amended Answer.

Now comes the defendant in the above-entitled action by its attorneys, and by leave of the Court first had and obtained, files this its amended answer, and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of the said complaint.

As to the allegations contained in paragraph II of said complaint this defendant has no information or belief upon the subject sufficient to enable him to answer the allegations contained in said paragraph II, and placing its denial upon that grounds, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were, at the time of the commencement of this action, or now are, copartners or engaged in business as such.

II.

Admits the allegations contained in paragraph III and IV of the said complaint.

III.

Admits that this defendant and H. H. Will Jorgensen and J. C. Will Jorgensen within the two years prior to the commencement [39] of this action constructed and erected a concrete bridge across the Stanislaus River under a written contract made between H. H. Will Jorgensen and J. C. Will Jorgensen, but defendant denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, either as copartners, or otherwise, performed any work and labor, or work or labor, and furnished materials, or fur-

nished materials for this defendant at its special instance and request, or its special instance or request in the construction and erection, or the construction or erection of one of the piers of the said bridge located in said river in addition to the work, labor and materials provided for in said contract, and denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, or either of them, either as co-partners, or otherwise, ever performed any services or did any work or labor in addition to the work, labor and materials, or labor or materials, provided for in said contract, of the reasonable value of Seven Thousand Nine Hundred Fifty-six Dollars (\$7,956), or of any value whatever.

Admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars (\$7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the Statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was performed, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim that the same was approved by the officer or agent of [40] the defendant, who di-

rected such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

IV.

Admits that the said plaintiff demanded that the said alleged claim be allowed and ordered paid and that the Board of Supervisors of Tuolumne County rejected said alleged claim and demand, as alleged in paragraph VI of said complaint, and admits that the said Board of Supervisors of the said County of Tuolumne has refused and still refuses to pay or allow the said alleged claim.

V.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground, denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value received duly, or otherwise, assigned, transferred and set over, or assigned or transferred or set over, all of their said alleged claim and demand, or claim or demand, and all moneys, or all moneys, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

VI.

Admits that no part of said alleged claim has ever been paid by the said defendant, but denies that the whole thereof, or any part thereof, or any sum whatever, is due, owing or unpaid from said defendant to the said plaintiff. [41]

Further answering said complaint, and for a further defense herein, to plaintiff's first cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued, more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular, that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defendant alleges that plaintiff's cause of action herein is barred by the provisions of Section 4075 of the Political Code of the State of California.

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of \$7,956.63, was not properly or legally payable by the said County of Tuolumne, through its

Board of Supervisors, for the reason that there was not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess [42] of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

In answer to plaintiff's second cause of action defendant admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of said second cause of action in said complaint.

As to the allegations contained in paragraph II in said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II of said second cause of action, and placing its denial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were at the time of the commencement of this action, or now are, copartners, or engaged in business as such.

II.

Admits the allegations contained in paragraph III and IV of said second cause of action in said complaint.

III.

This defendant admits the allegations contained in paragraph V and VI of the second alleged cause of action set forth in said complaint, and admits the allegations contained in paragraph VII thereof down to and including line 16 on page 6 of said second cause of action alleged in said complaint.

Denies that the plans and specifications filed and made a part of said contract as aforesaid, definitely or positively fixed, represented, or did positively fix or represent, the location of the bedrock underlying the bed of said river, and denies that said plans aforesaid positively or definitely fixed [43] a distance not to exceed 25 feet 6 inches from the spring line of the arches in said construction of said bridge, and alleges that plaintiff well knew, and said Jorgensen Bros., said copartners, well knew, before entering into said contract, that said plans hereinbefore mentioned only attempted to approximate the bedrock underlying said river, for the reason that the actual location of said bedrock could not be determined without excavation being made through and under said river, and said plaintiff and said Jorgensen Bros., copartners, well knew that such excavation had not been made, and they well knew that the specifications filed with said plans provided, "should it be determined that it is necessary to go to a greater depth than shown in said plans to reach bedrock, said work shall be done by the contractors without additional expense to either County," which provision would not have been in said specification had it been intended or provided that said plans

should definitely or positively fix the location of bedrock underlying said river as alleged in plaintiff's complaint.

And defendant denies that said plans when construed with said specifications warranted, or did warrant, the location of the depth to bedrock in said river at said point, or place as aforesaid, or represented the same as a fact known to or ascertained by the maker of said plans, or to defendant, or so as to induce the belief, and denies that said plans did induce the belief in said Jorgensen Bros., said copartners, and denies that prior to the time of entering into said contract, and making their bid therefor, did believe by reason of said plans and specifications that said location of bedrock, or depth to bedrock in said river shown in said plans as aforesaid was known to, or previously ascertained by the maker of said plans and defendant, and denies that they did believe that bedrock underlying said [44] river to be in fact as shown by said plans, and alleges that said specifications accompanying and made a part of said plans did request that contractors view the proposed work on the grounds, and judge all its nature and character before presenting bids, and denies that they made and entered into the contract as aforesaid under the belief, or that they were thereunto induced by the belief, or by the said plans and representation thereon and therein, that bedrock at said point or place in said river was and would be found at the depth as shown in and by said plans, and denies that said plans did represent the said location of said bedrock and the depth of bedrock in said

river at said place or point according to the actual fact, or the actual location of said bedrock, or depth to bedrock at said place or point in said river, but, on the contrary, said specifications which were made a part of said plans and profile did specifically provide, "it is *assumed* that the bedrock on each side of the river will be found at a depth shown on said plans," and nowhere in said specifications does it appear that said plans did positively or definitely fix the location of the bedrock underlying said river.

IV.

Admits that the bedrock in the said river was found at a greater depth than indicated in and by said plans and specifications, and alleges that under the terms of said contract that the extra work rendered necessary by reason of the bedrock being at a greater depth at the point indicated in and by the said plans was to be performed at the expense of the said Jorgensen Bros., contractors for the construction of said bridge, at their expense and free from any expense whatever to this county; deny that said plans were negligently and carelessly made, or [45] negligently or carelessly made, drawn and filed by the County Surveyor of said County of Tuolumne or this defendant, or either of them, and deny that by reason of any negligence or carelessness of the said County Surveyor and this defendant that the said plaintiff was deceived or kept in ignorance of the actual location and depth of the said bedrock or the depth of the bedrock in said river at the point where said bridge was constructed, and as to the allegation in said complaint that the bedrock was and is more

than 25 feet 6 inches from the point or place indicated on the said plans, defendant had no information or belief sufficient to enable it to answer said allegation, and placing its denial on that ground, denies that the bedrock was and is, or was or is, 25 feet 6 inches, or any distance whatever below the point indicated in and by the said plans and specifications.

Denies that the said Jorgensen Brothers were at the time they entered into said contract with this defendant, or at any time after they had commenced any of the construction of the said bridge under said contract, in entire ignorance in the manner in which said plans and specifications were drawn or in ignorance of the fact that the bedrock or depth of bedrock in said river at or near or at or near the point and place indicated by said plans and specifications would be found at a greater, or any greater, depth than fixed and shown and indicated in and by the said plans.

V.

Further answering, defendant alleges that at the time of entering into the contract for the construction of said bridge and at the time of the commencement of the work of constructing said bridge under said contract, that the said Jorgensen Brothers were in possession of the same knowledge and facts as to the depth of the bedrock at the point where said bridge was constructed [46] as this defendant, and that the said Jorgensen Brothers entered into said contract with said defendant for the construction of said bridge, and entered into the work of constructing said bridge with the full knowledge that

the physical conditions existing at the point of the Stanislaus River where said bridge was constructed, rendered it impossible to determine the depth from the bed of said river to the bedrock without doing the actual work of excavating to said bedrock.

Denies that the foundation of the pier, or any pier, of the said bridge could not be constructed as shown on the said plans and specifications, and denies that the pier of said bridge could not have been thoroughly embedded in the bedrock as shown as required and prescribed by said plans and specifications contained in the contract for the construction of said bridge.

VI.

Admits that N. J. Pickle, County Surveyor of the said County of Tuolumne, at all times during the progress of the work of construction of the said bridge was the superintendent of the defendant and in charge of the said work for the defendant, and was authorized and directed by the said defendant to see that the said bridge was constructed in accordance with the said plans and specifications and in accordance with said contract; but denies that said Jorgensen Brothers were required by said N. J. Pickle or by this defendant to do any work not specified and required by the terms of said contract.

Denies that by reason of or by and through, or by or through, any wrongful, negligent and careless, or wrongful, negligent or careless, act of the defendant, or its officers or agent, the said Jorgensen Brothers were compelled to make any excavations or dig in the bed of the said river for bedrock at any point or

place in said river, a distance of more than 25 feet and 6 [47] inches in depth, or any depth, and allege that any excavation work done by the said Jorgensen Brothers was in strict accordance with the requirements of the said contract and not by reason of any wrongful or careless or negligent act of this defendant, or any of its officers or agents.

Denies that the said Jorgensen Brothers were put to great loss and expense or great loss or expense, or any loss or expense, and compelled to do their said work, or compelled to do their said work at a largely increased cost, or at any increased cost by reason of any wrongful, negligent or careless act of the said defendant or any of its officers or agents.

Denies that by and through, or by or through, any wrongful, careless or negligent act of this defendant, its officers or agents, said Jorgensen Brothers were compelled to perform and furnish, or perform or furnish, any additional work, labor and materials, or work or labor or materials in the construction and erection of the pier in said river or any pier in said river in connection with the construction of said bridge and to extend, or to extend said pier downward for and to, or for or to, the additional distance of more than 25 feet 6 inches to bedrock, or any depth to bedrock whatever, and denies that by reason of any wrongful or negligent act of said defendant or its officers or agents, the said Jorgensen Brothers were put to great loss and expense, or any loss or expense, or compelled to erect said pier or any pier, at a largely increased cost.

Denies that said Jorgensen Brothers performed

any additional work or labor or furnished any materials by reason of any wrongful or negligent or careless act of the said defendant, or its agents, or its officers, and denies that by reason of any wrongful or negligent act of the said defendant, its officers or agents, the said Jorgensen Brothers were required to incur [48] any cost or expense for work or labor or materials other than what was required by the terms and conditions of said contract, and deny that by reason of any wrongful, careless or negligent act of the said defendant or its officers or agents, or by reason of any defect in the said plans and specifications, the said Jorgensen Brothers were injured and damaged in the sum of Seven Thousand Nine Hundred Fifty-six Dollars, or any sum whatever, or at all.

VII.

In answer to paragraph XI of plaintiff's second cause of action, defendant admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars (\$7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the Statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was per-

formed, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim that the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner. [49]

VIII.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value, received duly, or otherwise, assigned, transferred and set over, or assigned or transferred or set over, all of their said alleged claim and demand, or claim or demand, and all moneys, or all moneys, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

Further answering said complaint and for a further defense herein, to plaintiff's second cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were

entirely rendered and furnished, and all the items of said alleged claim accrued more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular, that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defendant alleges that plaintiff's cause of action herein is barred by the provisions of Section 4075 of the Political Code of the State of California. ,[50]

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of \$7,956.63, was not properly or legally payable by the said County of Tuolumne, through its Board of Supervisors, for the reason that there was not sufficient moneys in the County Treasury of Tuolumne County, at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials, specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

WHEREFORE, defendant prays that the said plaintiff take nothing by this action and that this defendant have a judgment against the said plaintiff and for its costs herein.

ROWAN HARDIN,
District Attorney of Tuolumne Co., Attorney for
Defendant.

E. W. HOLLAND,
Attorney for Defendant.

J. C. CAMPBELL,
Attorney for Defendant. [51]

State of California,
County of Tuolumne,—ss.

T. F. McGovern, being duly sworn, deposes and says: That he is Chairman of the Board of Supervisors of the County of Tuolumne, State of California, and as such Chairman of the Board of Supervisors is an officer of said County of Tuolumne, State of California, the defendant named in the above-entitled action; that he has read the foregoing amended answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters he believes it to be true; that affiant makes this verification for and in behalf of the County of Tuolumne, defendant named in said above-entitled action.

T. F. McGOVERN.

Subscribed and sworn to before me this 8th day of March.

[Seal] ROWAN HARDIN,
Notary Public in and for the County of Tuolumne,
State of California.

Due service of a copy hereof admitted March 21, 1911.

F. J. SOLINSKY,
FRANK R. WEHE,
Attys. for Plaintiff.

[Endorsed]: Filed Mar. 21, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[52]

At a stated term, to wit, the July term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom, in the City and County of San Francisco, on Wednesday, the 25th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Order Allowing Defendant to File Second Amended Answer.

* * * * *

Upon motion of Mr. Campbell, it was ordered that the defendant may file its second amended answer herein. [53]

* * * * *

*In the Circuit Court of the United States in and for
the Ninth Circuit, Northern District of California.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation
of the State of California,

Defendant.

Second Amended Answer.

Now comes the defendant in the above-entitled action by its attorneys, and by leave of the Court first had and obtained, files this its Second Amended Answer, and admits, denies and alleges as follows: ,

I.

Admits the allegations contained in paragraph I of the said complaint.

As to the allegations contained in paragraph II of said complaint this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II, and placing its denial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were, at the time of the commencement of this action, or now are, co-partners or engaged in business as such.

II.

Admits the allegations contained in paragraphs III and IV of the said complaint.

III.

Admits that this defendant and H. H. Will Jorgensen and [54] J. C. Will Jorgensen within the two years prior to the commencement of this action constructed and erected a concrete bridge across the Stanislaus River under a written contract made between H. H. Will Jorgensen and J. C. Will Jorgensen, but defendant denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen, or either of them, either as copartners, or otherwise, performed any work and labor, or work or labor, and furnished materials, or furnished materials for this defendant at its special instance and request, or its special instance or request, in the construction and erection, or the construction or erection of one of the piers of the said bridge located in said river in addition to the work, labor and materials provided for in said contract, and denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, or either of them, either as copartners or otherwise, ever performed or did any work or labor in addition to the work, labor and materials, or labor or materials, provided for in said contract, of the reasonable value of Seven Thousand Nine Hundred Fifty-six Dollars (\$7,956), or of any value whatever.

Admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars (\$7,956.63), but denies that said alleged bill or claim was prepared

or filed in the manner required by the law and the statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, or at all, and denies that said claim was presented within one year after the last of said alleged work and labor or work or labor was performed, or after the last of said [55] alleged materials was furnished, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant, of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

IV.

Admits that the said plaintiff demanded that the said alleged claim be allowed and ordered paid, and that the Board of Supervisors of Tuolumne County rejected said alleged claim and demand, as alleged in paragraph VI of said complaint, and admits that the said Board of Supervisors of the said County of Tuolumne has refused and still refuses to pay or allow the said alleged claim.

V.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial

upon that ground denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value received, duly, or otherwise, assigned, transferred and set over, or assigned, or transferred or set over, all of their said alleged claim and demand, or claim or demand, or any part thereof, and all moneys, or all moneys, or any part thereof, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand. [56]

VI.

Admits that no part of said alleged claim has ever been paid by the said defendant, but denies that the whole thereof, or any part thereof, or any sum whatever, is due, owing or unpaid from said defendant to the said plaintiff.

FURTHER ANSWERING said complaint and for a further defense herein, to plaintiff's first cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defend-

ant alleges that plaintiff's cause of action herein is barred by the provisions of section 4075 of the Political Code of the State of California.

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished the amount of said alleged claim, to wit, the sum of \$7,956.63, was not properly or legally payable by the said County of Tuolumne, through its Board of Supervisors, for the reason *that were* not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and [57] the furnishing of said alleged extra materials specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

In ANSWER to plaintiff's SECOND CAUSE OF ACTION, defendant admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of said second cause of action in said complaint.

As to the allegations contained in paragraph II in said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II of said second cause of action, and placing its de-

nial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were at the time of the commencement of this action or now are copartners, or engaged in business as such.

III.

This defendant admits the allegations contained in paragraphs V and VI of the second alleged cause of action set forth in said complaint, and admits the allegations contained in paragraph VII thereof down to and including line 16 on page 6 of said second cause of action alleged in said complaint.

Denies that the plans and specifications or either of them, filed and made a part of said contract as aforesaid, fixed, represented, showed and indicated, or fixed, or represented or showed or indicated, or so fix, represent, show and indicate, or fix or represent or show or indicate, the location of the bedrock underlying the bed of said river and denies [58] that said plans aforesaid, or either of them, fixed a distance not to exceed 27 feet 6 inches from the spring line of the arches in said construction of said bridge, or any other distance from said bedrock to said spring line as an ascertained fact, and alleges that plaintiff well knew and said Jorgensen Brothers, said copartners, well knew before entering into said contract, that said plans hereinbefore mentioned only attempted to approximate the bedrock underlying said river, for the reason that the actual location of said bedrock could not be determined without excavation being made through and under said river, and said plaintiff and said Jorgensen Brothers, co-

partners, well knew that such excavation had not been made, and they and each of them well knew that the specifications filed with said plans provided: "should it be determined that it is necessary to go to a greater depth than shown in said plans to reach bedrock, said work should be done by the contractors without additional expense to either county," which provision would not have been in said specifications had it been intended or provided that said plans should definitely or positively or at all fix, as an ascertained fact, the location of bedrock underlying said river as alleged in plaintiff's complaint.

And defendant denies that said plans or any of them warranted, or did warrant, the location of, and the depth to or the location of or the depth to bedrock in said river at said point, or place as aforesaid, or represented the same as a fact known to or ascertained by the maker of said plans, or to defendant, or so as to induce the belief, and denies that said plans or either of them did induce the belief in said Jorgensen Brothers, said copartners, and denies that prior to the time of entering into said contract or making the bid therefor they or either of [59] them did believe by reason of said plans and specifications, or either of them, that said location of bedrock, or depth to bedrock in said river shown in said plans as aforesaid, was known to, or previously ascertained by, the maker of said plans, or the defendant, and denies that they or either of them did believe that the bedrock underlying said river was in fact as shown by said plans, and alleges that said specifications accompanying and made a part of said plans did request

that contractors view the proposed work on the ground and judge of its nature and character before presenting bids, and denies that they made and entered into the contract as aforesaid under the belief, or that they were thereunto induced by the belief, or by the said plans and representations thereon or therein, that bedrock at said point or place in said river was, and would be found at, the depth as shown in and by said plans, and denies that said plans did represent the said location of said bedrock or the depth to bedrock in said river at said place or point according to the actual fact, or the actual location of said bedrock, or depth to bedrock at said place or point in said river, but, on the contrary, defendant alleges that said specifications which were made a part of said plans and profile and with which said plans and profile were to be construed, did specifically provide as follows: "It is *assumed* that the bedrock on each side of the river will be found at a depth shown on said plans," and nowhere does it appear that said plans or specifications did fix the location of the bedrock underlying said river as an ascertained fact.

IV.

Admits that the bedrock in the said river was found at a greater depth than indicated in and by said plans and specifications, and alleges that under the terms of said contract that [60] the extra work rendered necessary by reason of the bedrock being at a greater depth at the point indicated in and by the said plans, was to be performed at the expense of the said Jorgensen Brothers, contractors for the

construction of said bridge, at their expense and free from any expense whatever to said County of Tuolumne; denies that said plans were negligently and carelessly, or negligently or carelessly, made or drawn or filed by the County Surveyor or this defendant, or that the said Jorgensen Brothers, said copartners, were deceived or kept in ignorance of the actual location or depth of the said bedrock or the depth to the bedrock in said river at the point where said bridge was constructed; and as to the allegation in said complaint that the bedrock was and is more than 25 feet 6 inches from the point or place indicated on the said plans, defendant has no information or belief sufficient to enable it to answer said allegations, and placing its denial on that ground, denies that the bedrock was and is, or was or is, 25 feet 6 inches, or any distance whatever, below the point indicated in and by the said plans and specifications.

Denies that the said Jorgensen Brothers were at the time they entered into said contract with this defendant, or at any time after they commenced any of the construction of the said bridge under said contract, in entire or any ignorance in the manner in which said plans and specifications were drawn, or in ignorance of the fact that the bedrock or depth to bedrock in said river at or near the point and place indicated by said plans and specifications would be found at a greater or any greater depth than fixed and shown and indicated in and by the said plans.

V.

Further answering, defendant alleges that at the time of [61] entering into the contract for the

construction of said bridge and at the time of the commencement of the work of constructing said bridge under said contract, the said Jorgensen Brothers were in possession of the same knowledge and facts as to the depth to the bedrock at the point where said bridge was constructed as this defendant, and that the said Jorgensen Brothers entered into said contract with said defendant for the construction of said bridge and entered into the work of constructing said bridge with the full knowledge that the physical conditions existing at the point on the Stanislaus River where said bridge was constructed rendered it impossible to determine the depth from the bed of said river to the bedrock without doing the actual work of excavating to said bedrock.

Denies that the foundation of the pier, or any pier, of the said bridge could not be constructed as shown on the said plans and specifications, and denies that the pier of said bridge could not have been thoroughly embedded in the bedrock as shown, required and prescribed by said plans and specifications contained in the contract for the construction of said bridge.

VI.

Admits that N. J. Pickle, County Surveyor of the said County of Tuolumne, at all times during the progress of the work of construction of the said bridge was the superintendent of the defendant, and in charge of the said work for the defendant, and was authorized and directed by the said defendant to see that the said bridge was constructed in accordance with the said plans and specifications, and in ac-

cordance with the said contract; but denies that said Jorgensen Brothers were required by said N. J. Pickle or by this defendant to do any work not specified and required by the terms of said contract. [62]

Denies that by reason of, or by and through, or by or through any wrongful, negligent and careless, or wrongful, or negligent, or careless, act of the defendant, or its officers or agent, the said Jorgensen Brothers were compelled to make any excavations or dig in the bed of the said river for bedrock at any point or place in said river, a distance of more than 25 feet and 6 inches in depth, or any depth, and alleges that any excavation work done by the said Jorgensen Brothers was in strict accordance with the requirements of the said contract and not by reason of any wrongful or careless or negligent act of this defendant, or any of its officers or agents.

Denies that the said Jorgensen Brothers were put to great loss and expense or great loss or expense, or any loss or expense, and compelled to do their said work, or compelled to do their said work, at a largely increased expense or cost, or at any increased cost, by reason of any wrongful or negligent or careless act of the said defendant or any of its officers or agents.

Denies that by and through, or by or through, any wrongful, or careless or negligent act of this defendant, its officers or agents, said Jorgensen Brothers were compelled to perform and furnish, or perform or furnish, any additional work, labor and materials, or work or labor or materials, in the construction or erection of the pier in said river or any pier in said

river in connection with the construction of said bridge, and to extend, or to extend, said pier downward for and to, or for or to, the additional distance of more than 25 feet 6 inches to bedrock, or any depth to bedrock whatever, and denies that by reason of any wrongful or negligent act of said defendant or its officers or agents, the said Jorgensen Brothers were put to great loss and expense, or any loss or expense, or compelled to erect said [63] pier or any pier, at a largely or at all increased cost.

Denies that said Jorgensen Brothers performed any additional work or labor, or furnished any materials, by reason of any wrongful or negligent or careless act of the said defendant, or its agents or officers, and denies that by reason of any wrongful or negligent act of the said defendant, its officers or agents, the said Jorgensen Brothers were required to incur or did incur any cost or expense for work, or labor, or materials, and denies that by reason of any wrongful or careless or negligent act of the said defendant, or its officers or agents, or by reason of any defect in the said plans and specifications, or either of them, the said Jorgensen Brothers were injured and damaged or injured or damaged in the sum of Seven Thousand Nine Hundred Fifty-six Dollars (\$7,956), or any sum whatever, or at all.

VII.

In answer to paragraph XI of plaintiff's second cause of action, defendant admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of

Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars (\$7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the statutes of the State of California, in and for such cases made and provided; and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was performed, or after the last of said materials was furnished, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and [64] filing of said alleged claim the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant, of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

VIII.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground, denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value, received, duly or otherwise, assigned, transferred and set over, or as-

signed, or transferred or set over, all or any part of their said alleged claim and demand, or claim or demand, and all or any moneys payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

FURTHER ANSWERING said complaint and for a FURTHER DEFENSE herein to plaintiff's second cause of action, this defendant alleges:

I.

That the alleged work and labor performed and *materaisl* furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued, more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of [65] the County of Tuolumne, and alleges in particular that the last item of said alleged claim accrued more than one year prior to the date when said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County; and this defendant alleges that plaintiff's alleged cause of action herein is barred by the provisions of section 4075 of the Political Code of the State of California.

II.

Further answering said complaint and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars (\$7,956.63), was not properly or legally payable by the said County of

Tuolumne through its Board of Supervisors, for the reason that there were not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials specified in said alleged claim, available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne for the year during which said alleged extra work and labor was performed and materials furnished.

WHEREFORE, defendant prays that the said plaintiff take nothing by this action, and for its costs herein.

ROWAN HARDIN,
E. W. HOLLAND and
J. C. CAMPBELL,

Attorneys for Defendant. [66]

State of California,

City and County of San Francisco,—ss.

T. F. McGovern, being duly sworn, deposes and says: That he is the Chairman of the Board of Supervisors of the County of Tuolumne, State of California, and as such Chairman of said Board of Supervisors is an officer of said County of Tuolumne, the defendant named in the within entitled action; that he has read the foregoing Second Amended Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be

true; that affiant makes this verification for and on behalf of said County of Tuolumne, the defendant named in the within-entitled action.

T. F. McGOVERN.

Subscribed and sworn to before me this 20th day of October, 1911.

[Seal]

FLORA HALL,

Notary Public, in and for the City and County of San Francisco, State of California.

Due service of a copy hereof admitted Oct. 25, 1911.

SOLINSKY & WEHE,

For Plaintiff.

[Endorsed]: Filed Oct. 25th, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [67]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of California.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 25th day of October, 1911, being a day in the July, 1911, Term of said Circuit Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, F. R. Wehe, and Paul

C. Morf, Esqrs., appearing as attorneys for plaintiff, and J. C. Campbell, Rowan Hardin and Walter Shelton, Esqrs., appearing as attorneys for defendant, and the trial having been proceeded with on the 26th and 27th days of October, all in said year and term, and evidence oral and documentary having been introduced and the attorneys for the defendant having at the close of plaintiff's case moved the Court for a judgment of nonsuit and the Court, after hearing arguments of the respective parties upon said motion, and after full consideration thereof having ordered that said motion be granted and that a judgment of nonsuit be entered herein, with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and is hereby entered against said plaintiff herein; that defendant go hereof without day; and that defendant recover from plaintiff [68] its costs in this behalf expended, taxed at \$311.65.

Judgment entered October 27, 1911.

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,

Deputy Clerk.

A True Copy. ATTEST:

[Seal]

SOUTHARD HOFFMAN,

Clerk.

By W. B. Maling,

Deputy Clerk.

[Endorsed]: Filed October 27, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.
[69]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, in and for the Northern Dis-
trict of California.*

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Clerk's Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 27th day of October, 1911.

[Seal]

SOUTHARD HOFFMAN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed October 27, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of California.*

Hon. W. C. VAN FLEET, Judge.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation
of the State of California,

Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial on the law side of the court on Wednesday, the 25th day of October, 1911, before Hon. W. C. Van Fleet, District Judge, presiding, and a jury was duly impanelled, selected and sworn, whereupon the following proceedings were had:

Plaintiff, by one of his attorneys, Frank R. Wehe, opened the cause and stated generally what he expected to prove.

Whereupon plaintiff offered in evidence a written contract made and executed on the 8th day of September, 1908, between the County of Tuolumne and J. C. Will Jorgensen and H. H. Will Jorgensen, and asked that the same be marked "Plaintiff's Exhibit 1." Defendant objected to the introduction of said contract in evidence upon the ground that said instrument was inadmissible, for the reason that said contract had never been filed for record in the County

Recorder's Office, the same being a building contract involving more than one thousand dollars. Pursuant to stipulation of counsel for both plaintiff and defendant, [71] the Court reserved its ruling upon said objection until the final argument, and admitted said contract in evidence subject to said objection. The said contract admitted in evidence was marked "Plaintiff's Exhibit 1," and is in words and figures following, to wit:

[Plaintiff's Exhibit No. 1.]

THIS CONTRACT AND AGREEMENT, made and entered into this 8th day of September, A. D. 1908, by and between the County of Tuolumne, a Municipal Corporation, in the State of California, acting in its representative capacity, by and through its Board of Supervisors who were duly authorized, the party of the first part, and H. H. Will Jorgensen and J. C. Will Jorgensen, partners doing business under the firm name and style of Jorgensen Brothers, of the City and County of San Francisco, the parties of the second part,

WITNESS that whereas, said Board of Supervisors, by Order and Resolution, regularly made and legally advertised, has ordered the Construction of a Bridge crossing the Stanislaus River at Melones on the road from Sonora to Angels Camp at a point known as Robinsons Ferry, and the bids for the same be received on the 24th day of August, A. D. 1908.

AND, WHEREAS, the parties of the second part, in response to said order, Resolution and Notice, did present their bid and proposal for said work, and said Board of Supervisors being fully advised of the de-

cision in the premises, did, by Order and Resolution regularly made, accept said bid and proposal of said parties of the second part, and did let and award to them the Contract for said work, and provide for the execution and delivery of this agreement.

NOW, THEREFORE, in consideration of the premises, [72] and a further consideration of the sum of \$16,775.00, to be paid by the party of the first part, as hereinafter expressed and provided, the party of the second part, for themselves, their successors and assigns, promise and agree, with said party of the first part, that they will honestly and faithfully perform the work herein referred to within the time hereinafter expressed, and upon payment of said sum and the further sum of \$4.00 per cubic yard for stone retaining wall and the further sum of \$.35 per cubic yard for any fill required, will deliver the same to the party of the first part or its authorized agents.

NOW, in consideration of the performance of the covenants and agreements as above set forth by the parties of the second part, and as compensation agreed upon for said work, the party of the first part covenants and agrees to pay, or cause to be paid to said parties of the second part during the progress of said work, and when the same shall have been completed and accepted as hereinafter provided, the sum of \$16,775.00; said sum to be paid in regularly and legally drawn warrants upon the Treasury of the said party of the first part, and to be divided into two payments as follows:

FIRST: Seventy-Five per cent of one half of the

Contract price herein, shall become due and payable when one half of the work of constructing said Bridge is completed, provided, however, that said payment shall not be made before the 7th day of December, 1908.

SECONDLY: When the Bridge is completed, ready for travel and accepted by the Board of Supervisors, then the balance remaining unpaid, shall be due and payable, Provided, however, that the remainder of the contract price of said [73] Bridge shall not be payable prior to the first Monday in May, 1909.

AND IT IS FURTHER EXPRESSLY UNDERSTOOD AND AGREED, between the parties hereto.

First: That the plans and specifications filed with the County Clerk shall constitute a part of this Contract, and that said construction, erection, and work, shall be done and completed in a good and workman-like manner, according to said plans and specifications; that the materials used shall be of first quality of its respective kind, and suitable for the purpose intended.

Second: That said party of the first part or their regularly appointed agent or superintendent shall at all times during the progress of said work, have free access thereto, and be allowed to examine the same, and all materials intended to be used in said structure, and if the same or any part thereof, shall not be in accordance with said Plans and Specifications, it shall reject and refuse to accept such defective work or materials, provided that such rejection of work and materials shall be made before their use.

Third: That the parties of the second part are to have the free use of the right of way over or upon which said work is to be performed, together with the right of way to and from said site, and sufficient room adjacent to the same, upon which to work, and the party of the first part is to save the parties of the second part harmless from any expense, delay or litigation on account of said right of way, or its right to let this contract.

Fourth: That said work shall be completed by the parties of the second part on or before May 1st, 1909, unless such completion is delayed by the act of God, high water, litigation or other unexpected circumstance. [74]

Fifth: Upon notice of the completion of said work, the party of the first part or its agent shall proceed without delay to examine the same, and if found to be in accordance with the aforesaid plans and specifications, and this agreement, shall accept such work, and shall notify the second parties or their agents of such acceptance.

Sixth: Said amount of \$16,775.00 shall be paid in legally executed and regularly issued County Warrants of said Tuolumne County, the party of the first part agreeing to levy the necessary taxes, and to pay the same as required by law, and the parties of the second part to receive and accept the same at their par value.

Seventh: The ability to perform and the prompt performance of all terms, conditions and agreements of this contract by each of the parties hereto shall be a condition, precedent to the obligation of the other party to further pay or proceed hereunder.

IN WITNESS WHEREOF said party of the first part, acting in its representative capacity, by its Board of Supervisors, has caused these presents to be duly signed and subscribed, and its corporate name and seal to be attached by T. F. McGovern, Chairman, who is duly authorized and hereunto sets his hand as and for the act of said party of the first part and the said parties of the second part have caused their firm name to be hereunto subscribed by J. C. Will Jorgensen, a member of said firm, who is duly authorized, the day and year first herein mentioned.

COUNTY OF TUOLUMNE.

By T. F. McGOVERN,

Chairman Board of Supervisors,

County of Tuolumne.

JORGENSEN BROS.,

By J. C. WILL JORGENSEN. [75]

Plaintiff then offered, as a part of the contract just offered, the plans, drawings and specifications endorsed "Adopted July 20, 1908, T. F. McGovern, Chairman of the Board of Supervisors"; and filed with the County Clerk of Tuolumne County on July 20, 1908, and consisting of specifications entitled "Specifications for a reinforced concrete bridge across the Stanislaus River between Tuolumne and Calaveras Counties, near Melones, California," and six plans and drawings entitled as follows:

[Plaintiff's Exhibit No 2.]

1. "Stress sheet for reinforced concrete bridge across the Stanislaus River between Tuolumne and Calaveras Counties, California, N. J. Pickel, County Surveyor."

2. Entitled the same except that it gives the scale.

3. "Profile of bridge across the Stanislaus River, near Robinson's Ferry, for Tuolumne and Calaveras Counties, surveyed June, 1908, N. J. Pickle, County Surveyor, Tuolumne County, California."

4. "Map of site for bridge across Stanislaus River, near Robinson's Ferry, for Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor, Tuolumne County, California, June 1908."

5. "Proposed bridge across the Stanislaus River, between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor."

6. "Details of proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle."

Subject to the same objections, ruling and decision as were made upon the introduction of Plaintiff's Exhibit One, the said specifications and plans were admitted in evidence as one document and marked "Plaintiff's Exhibit 2," and plaintiff here prays as a part of this bill that the judge who presided at said trial make a rule or order for the safekeeping, transportation and return of said plans and drawings, said "Plaintiff's Exhibit [76] 2," so that the Circuit Court of Appeals may receive and consider such original papers in connection with this bill, and the transcript and proceedings.

That said specifications were in the words and figures following, to wit:

SPECIFICATIONS FOR A REINFORCED
CONCRETE BRIDGE ACROSS THE STAN-
ISLAUS RIVER BETWEEN TUOLUMNE
AND CALAVERAS COUNTIES, NEAR ME-
LONES, CALIFORNIA.

LOCATION.

The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.

The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.

GENERAL DESCRIPTION.

The dimensions of this reinforced bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

The approaches at either end of the concrete bridge will consist of an earth and stone fill of lengths as shown on the profile plan and shall be bid on at a price per cubic yard. Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

FOUNDATIONS.

Are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bed rock. It is assumed that the bed rock on each side of the river will be found at a depth shown on plans. [77] Should it be determined that it is necessary to go to a greater depth than this to reach bed rock this work

shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation.

For the pier that is to be placed in the river the contractor will be permitted to deposit not more than 4 feet of concrete in the water to seal the bottom of the forms. In depositing this concrete he shall resort to some device that will prevent the washing out of the cement while the concrete *w* is passing through the water. No concrete under any conditions will be permitted to be deposited in running water. After the concrete which is deposited in the bottom of the pier for the purpose of sealing it, has become sufficiently set the contractor will then be required to pump out the piers and keep them clear of water during the operation of casting the balance of the concrete.

CONCRETE.

The concrete shall be fabricated of Portland cement, sand and broken rock or gravel. Either rock or gravel may be used at the option of the contractor. All concrete that is to be deposited in water shall be made of one part of cement to 4 parts of aggregates. The concrete in the foundations not placed in the water will consist of one part of cement, 2 parts of sand, and 5 parts of gravel. Concrete in the arch rings will consist of one part of cement, 2 parts of sand and 4 parts of gravel. All concrete shall be thoroughly mixed twice dry and once wet and rammed until water stands on the surface.

Concrete shall be placed in layers of not to exceed 8 inches. Before depositing any fresh concrete on

that which has already set, the surface of the cold concrete shall be thoroughly cleaned and roughened and then dusted with dry cement. Upon removal of the forms if any surface pockets are exposed the contractor [78] shall immediately fill them with cement mortar consisting of one part of cement and two parts of sand. Forms shall remain in place 10 days before stripping.

The cement to be used will consist of any well established brand and will conform to the conditions prescribed by the Committee on cement tests of the American Society of Civil Engineers, which requires that for fineness not less than 92% by weight of the cement must pass through a sieve of 100 meshes to the inch, and not less than 75% by weight must pass through a sieve of 200 meshes to the inch. The minimum tensile strength for neat cement per square inch must be as follows:—

150 lbs. for 24 hours (in air until hard and set, in water the remainder). 450 lbs. for 7 days (one day in air and 6 days in water). 550 lbs. for 28 days (one day in air and 28 days in water).

Briquettes made of one part cement to 3 parts of sand shall develop a minimum tensile strength per square inch as follows:

150 lbs. for 7 days (one day in air and 6 days in water), 225 lbs. for 28 days (one day in air and 27 days in water). Each car load of cement received at the bridge site shall be tested by the Engineer in charge before being placed in the work.

REINFORCED MATERIALS.

The reinforcement of this bridge shall consist of corrugated steel bars of sizes as noted on plans.

These bars must have an elastic capacity of not less than 50,000 pounds per square inch, and an elongation not to exceed 12% in 8 inches. Where it is found necessary to lap the bars the laps shall not be less than 2 feet. All reinforcement shall be placed accurately in position and any carelessness on the part of the contractor in performing this will be considered sufficient ground for the engineer in [79] charge to require the removal of the work and the replacement of it correctly.

FILLS.

The contractor will be required to make the necessary fills between the spandrel walls and from end of wing wall to end of wing wall covering a distance of 350 feet. On top of this fill shall be spread a layer of gravel which is to be thoroughly wet and rolled for wearing surface. The deck shall have a crown of at least 5 inches.

APPROACHES.

The approach on each end of the bridge shall be an earth and stone fill for a distance and to the grade as shown on the profile plan. Rock retaining walls to protect the fills, so much as shall be considered necessary by the engineer in charge, shall be built by the contractor at a price per cubic yard, to be bid on the same as the approach fills.

HAND RAILING.

The railing shall consist of 2½ inch standard pipe securely screwed together with the proper couplings. The posts shall be embedded one foot in the concrete felloe guard and spaced as shown in the accompanying plan.

GENERAL PROVISIONS.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure.

[80]

All materials and workmanship shall be the best of their several kinds and all be under the supervision and to the satisfaction of the Board of Supervisors of each County and the Engineer in charge of the work.

During the absence of the contractor from the work his foreman or a designated agent shall be held to represent him. Instructions given by the authorized engineer to the contractor's foreman shall be considered as having been given to the contractor himself.

Specimens of the material used shall be furnished the engineer in charge of the work for examination and testing at his request and without charge.

All materials rejected by the Engineer in charge for either quality, shape, or workmanship that is not strictly in conformity with and to these specifications and the accompanying plans, shall be removed from the premises and the proper material substituted without delay or extra charge. And should

the contractor fail to complete this bridge in the time specified in the contract hereinafter mentioned, the public may use any portion of the bridge, but such use shall not constitute an acceptance thereof.

These specifications and drawings are the property of the said Board of Supervisors, and shall be returned to them upon the completion of the said contract.

Upon the completion of this bridge, all machinery, or material that does in any way obstruct the roadway, either on the bridge or its approaches, shall be removed by the contractor and said roadway left in condition to travel over as per plans and specifications.

PROPOSALS.

Proposals from Contractors for the construction of [81] this bridge and its approaches will be received not later than 2 o'clock P. M., on the 24th day of August, A. D. 1908, at the office of the Board of Supervisors of Tuolumne County.

All proposals must be accompanied by a certified check on some solvent bank of this state for a sum equal to 10% of the amount of such proposals and made payable to the said Board of Supervisors. Conditioned that if the said contract is awarded to such contractor and a satisfactory bond in a sum equal to the full amount of the proposal be furnished within ten days after the award of contract, then this check shall be returned to the said contractor, or his duly appointed agent, or a failure so to do will cause a forfeiture of such check as liquidated damages for such failure.

CONTRACT AND BOND.

A contract and bond as above mentioned shall be required and the said Board of Supervisors shall have the right to reject any and all proposals or to readjust the same, to pass upon the sufficiency of the securities or to disapprove of any and all bondsmen.

Plaintiff then offered and the court admitted in evidence resolutions of the Board of Supervisors of the County of Tuolumne showing that the adoption of said plans, drawings and specifications; the publication of notice of proposals for bids; the construction of said bridge; the acceptance of the bid of Jorgensen Bros., and the making of the said contract had all been duly ordered; and the following resolutions of the Board of Supervisors of Tuolumne County, the same being a part of Plaintiff's Exhibit 3, reading as follows: [82]

[Plaintiff's Exhibit No. 3.]

“Board of Supervisors, Tuolumne County,
Wednesday, February 23, 1910.

Board met pursuant to adjournment.

Present: T. F. McGovern, Chairman; A. S. Mackenzie, Paul Morris and V. A. Solari, Supervisors; J. B. Doyle, Clerk.

At this time Supervisor Morris moved the Board that whereas it appearing to this Board that from the certificate of the County Surveyor that the bridge across the Stanislaus River at Melone's has been completed in accordance with the contract, the plans and specifications; it is hereby ordered by this Board that the following claims filed with this Board by the Jorgensen Brothers, Contractors, who constructed

said bridge, be and the same is hereby allowed and ordered paid as full payment of amount due said Jorgensen Brothers for the construction of said bridge, in accordance with the contract, plans and specifications, to wit:

\$10,487.37; \$369.38; \$581.27; \$610,—and that certain bills filed by said Jorgensen Brothers purporting to be for alleged extra work and materials on the piers and wing walls of said bridge, to wit, the sum of \$9,576.55, be and the same is hereby rejected.

Seconded by Supervisor Solari. * * * * *
Motion carried unanimously.”

“Board of Supervisors, Tuolumne County, California

Tuesday, March 8th, 1910.

Present: T. F. McGovern, Chairman; A. S. McKenzie, S. A. Ferretti, V. A. Solari, and Paul Morris, Supervisors. J. B. Doyle, Clerk.

In the Matter of the Construction of the Bridge
Across the Stanislaus River at Melone's.

[83]

This Board having heretofore ascertained from the certificate of the County Surveyor, that the said Bridge has been constructed and completed in accordance with the Plans and Specifications, and this Board having on the 22d day of February, 1910, allowed and ordered paid to the Jorgensen Bros., Contractors, as full payment of the amount due said Jorgensen Bros. for the construction of the said Bridge, in accordance with the Contract and Plans and Specifications, One Claim of \$10,484.37, as balance due on the Contract price, one claim of \$369.38,

one claim of \$581.27, and one claim of \$610.00, on account of extra work, and this Board having on said date rejected one claim of said Jorgensen Bros. for the sum of \$9,576.55, for alleged extra work on said Bridge and interest;

NOW, at that time upon a reconsideration of said matter, IT IS ORDERED that said claim of \$10,-484.37 be, and the same is hereby, allowed and ordered paid as payment in full of the amount due on the contract price for the construction of said bridge, and that the same claim of \$9,576.55, be and the same is hereby rejected.

Board adjourned.

T. F. McGOVERN,
Chairman.

Attest: J. B. DOYLE, Clerk."

Plaintiff then offered the notice asking for bids which was published by the county and which was admitted in evidence, marked "Plaintiff's Exhibit 4," and in the words and figures following, to wit:

[Plaintiff's Exhibit No. 4.]

NOTICE TO CONTRACTORS.

Notice is hereby given that the Board of Supervisors of Tuolumne County, State of California, will receive sealed bids for the construction of a reinforced concrete bridge over the Stanislaus River at Melones, connecting Tuolumne and Calaveras counties, as per plans and specifications for the same prepared [84] by N. J. Pickle, County Surveyor, and adopted by the Board of Supervisors of Tuolumne County on Monday, July 20, 1908, and now on file with the Clerk of said Board.

Said sealed bids for said bridge will be received by said Board not later than Monday, Aug. 24, 1908, at 2 o'clock P. M.

All bids must be accompanied by a certified check on some solvent bank of this State in a sum equal to 10 per cent of the bid, payable to the chairman of the Board of Supervisors, the same to be forfeited in case of failure to sign contract and bond within ten days from the award of contract.

The Board reserves the right to reject any and all bids.

[Seal]

Attest: J. B. DOYLE,

Clerk of Board of Supervisors of Tuolumne County.

Dated: July 22, 1908.

Plaintiff then offered the written bid made by Jorgensen Bros. and accepted by the county, which was admitted in evidence and marked "Plaintiff's Exhibit 5," and was in the words and figures following, to wit:

[Plaintiff's Exhibit No. 5.]

"San Francisco, August 22, 1908.

To Chairman of the Honorable Board of Supervisors,
Tuolumne County.

Gentlemen:

We hereby propose to do the following work, furnishing all the necessary labor, materials, scaffoldings, etc., etc., concrete arch bridge, located on the Stanislaus River near Melones and between Tuolumne and Calaveras Counties, California, for the owners, A. C. C., according to plans and specifications by Mr. Pickles, County Surveyor. In consideration for this work we ask the sum of \$16,775

(Sixteen thousand seven hundred and [85] seventy-five dollars).

The time we ask for completion of work ——— days. All extra work on approaches, per yard, filling 35 cents per yard; stone or rock retaining wall, \$4.00.

**JORGENSEN BROTHERS,
B. J. C. WILL JORGENSEN."**

It was admitted that the portion of said bid with reference to filling had nothing to do with the subject matter of the contract, that all the case had to do with was the center pier.

Plaintiff then offered in evidence the written assignment of the claim in suit by Jorgensen Bros. to plaintiff, from which it appeared that the claim in suit had been assigned by Jorgensen Bros. to plaintiff prior to the commencement of the action, and the same was admitted in evidence.

Plaintiff then offered in evidence a duly verified claim made by Jorgensen Bros., filed with and presented to the Board of Supervisors of Tuolumne County on February 4, 1910, and rejected by the Board February 23, 1910, which said claim was in the words and figures following, to wit:

Demand of Jorgensen Brothers:

No.....	Fund
Demand on the Treasury of the County of Tuolumne,	
State of California, for the sum of \$9,576.55,	
Being for: Extra work on Melones Bridge.	[86]

Date.	Items.	Amount.
Feb. 4, 1910.	Amount due for extra work, labor, supplies and Mate- rials on center pier, as per itemized Statement hereto attached	\$7956.63
" " "	Amount due for extra work and Materials furnished on pier on Calaveras side of River, and Wing-Wall and Center-Wall on Cala- veras side	767.55
" " "	Amount due for cost of steel in constructing Wing- Wall and Center-Wall on Calaveras side of River..	143.00
	Interest on \$8,867.18, from February 1st, 1909, to February 1st, 1910, one year @ 8% per annum...	709.37
Total.....		\$9576.55

Expenditure authorized and approved by me

.....

Do not write here.

READ THESE INSTRUCTIONS.

All claims against the County must be duly veri-
fied and filed with the County Clerk on or before
three days prior to the First Monday in each month,
and must be properly itemized, giving names, dates
and particular service rendered, character of process
served, upon whom, distance traveled, where and

when, character of work done, number of days engaged, supplies or material furnished, to whom, and quantity and price paid therefor, and must be certified to by the proper authority ordering the work, etc., before filing with the **County Clerk**.

CLERK'S CERTIFICATE.

State of California,
County of Tuolumne,—ss.

I, J. B. Doyle, County Clerk and ex-officio Clerk of the [87] Superior Court of said County and State, do hereby certify that the foregoing is a true and correct copy of the Two Claims of Jorgensen Bros. presented to the Board of Supervisors and filed on the 4 day of Feb., 1910, same being for work performed on Melones Bridge, \$10,484.37/11 and \$9,576.55, and of the endorsements thereon and the same is a correct transcript of the record thereof now in my office.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said Court, on this 9 day of Mar., 1910.

[Seal]

J. B. DOYLE,
Clerk.

[Endorsed]:

State of California,
County of Tuolumne.

The undersigned, being duly sworn, says: That the within claim and the items as therein set out are true and correct; that no part thereof has heretofore been paid, and that the amount therein is justly due the claimant, and that the same is presented within one year after the last item thereof has accrued.

Jorgensen Bros. J. C. W. Jorgensen. Subscribed and sworn to before me this 4 day of Feb. 1910. J. B. Doyle, County Clerk. By J. B. Ryan, Deputy Clerk. Board of Supervisors, County of Tuolumne. Demand of Jorgensen Bros. On Fund.

Dated 190....

Filed Feb. 4, 1910. J. B. Doyle, Clerk of Board of Supervisors. J. B. Ryan, Deputy Clerk.

Rejected Feb. 23, 10. T. F. McGovern, Chairman Board of Supervisors.

No. 15,051. U. S. Circuit Court, Nor. Dist. of Cal. Pltffs. Exhibit 7. Oct. 27, '11. W. B. M., Deputy Clerk.

(Jorgensen Bros. Letter-head.)

Melones, Feb. 3d, 1910.

(1) Extra Work	
Labor Oct. 25th—Dec. 17th.....	\$2913.35
Gasoline	300.00
Tools, Machinery and Belting.....	350.00
Lumber in Cribbing, 15,500 B. M.	310.00
Nails	10.00
Concrete in centerpier: 1:6.	
Top 11'—wide, length 36'—6.	

[88]

Bott. 12'—6. Wide Length 36'6.

Average area 382..

Height of Pier 24'—0.

382x24

27 339.44 yds. @ \$12.00.....\$4073.28

\$7956.63

(Jorgensen Bros. Letter-head.)

San Francisco, Feb. 3d, 1910.

(2) Extra work.

Last Pier on Calaveras side.

10 (5.5x4 -47.5 per foot of width of Bridge.

2.

47.5x21

27) 37 yards.

2 Wing Walls 2x6x14x20

12 27 10.35 Yards.

2 Center Walls 2x6''x17.2' Long x 6'-°High.

3.82 Yards 51.17 Yard.

51.17 Yards @ \$15.00, \$767.55.

(Jorgensen Bros. Letter-head.)

Melones, Feb. 3d, 1910.

(3) Extra work.

Steel Enforcement.

Steel Reinforcement.

In Wing Walls (V) 16- $\frac{3}{8}$ -6'-0(4) 18- $\frac{3}{4}$ 25'-0In Center walls 14 $\frac{3}{8}$ 6'-018 $\frac{5}{8}$ 20'-0

Making of total of

864# of $\frac{3}{4}$ bars.479# of $\frac{5}{8}$ "87# of $\frac{3}{8}$ "

1430#

\$143.00. [89]

Thereupon defendant objected to the introduction of said claim in evidence on the ground that said

claim was not duly or at all itemized as required by law; because said claim was not approved by any officer of defendant who authorized said claim or the expenditures contained therein against said county; and for the further reason that said claim was not filed or presented within **one year after** the accrual thereof.

Whereupon the Court, upon stipulation between plaintiff and defendant, reserved its ruling upon said objection until final argument, and admitted said claim (marked "Plaintiff's Exhibit 7") in evidence; to which action and ruling of the Court defendant then and there reserved an exception on the grounds stated.

[Testimony of J. C. Will Jorgensen, the Plaintiff]

Whereupon J. C. WILL JORGENSEN was called as a witness for plaintiff, sworn, and testified as follows:

My name is J. C. W. Jorgensen.

I am the plaintiff in the action.

I am a member of the firm of Jorgensen Bros.

I am the party to whom Jorgensen Bros. assigned the claim in suit.

H. H. Will Jorgensen is a brother of mine.

We were partners in the contracting business.

Jorgensen Bros. constructed the bridge known as the concrete bridge across the Stanislaus River at Robinson's Ferry.

I did the actual figuring on the work that resulted in the bid for the construction of the bridge. Prior to making the bid I received from Tuolumne County for the purpose of enabling me to make the bid a

(Testimony of J. C. Will Jorgensen.)

copy of the specifications hereinbefore introduced and the following plans and drawings, namely, the plan marked "Proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor"; [90] also the one marked "Details of proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor." Before presenting my bid to the County of Tuolumne, on behalf of Jorgensen Bros., I visited the ground in accordance with the direction in the specifications and found that it compared pretty fairly with the nature of the ground, the conformation of the ground, the presence of bedrock, as compared with the sheet marked "Plan of proposed Bridge," and it gave me the impression that the profile I received was made according to the natural conditions. After we were awarded the contract the firm proceeded to construct the bridge. My brother was there when the center pier was constructed; I was not.

Cross-examination.

(By Mr. CAMPBELL.)

Mr. CAMPBELL.—Q. How much examination did you make of the river before you made the bid?

A. I went all over the bridge site and walked all over the ground and looked at it and went on the upper and lower side of the bridge site in order to see how the profile conformed with the blue-print profile I got.

Q. And according to your examination at that time, as you saw it, you imagined or you concluded

(Testimony of J. C. Will Jorgensen.)

that the profile showed it all right? A. Yes, sir.

Q. Did you make any examination to get down to bedrock at all?

A. No, I could not very well do it.

Q. There is a way of doing that, is there not?

A. Certainly.

Q. You say that you had before you the specifications before you put in your bid? A. Yes, sir.

Q. You read them over? A. Oh, yes.

Q. You are a contractor? A. Yes, sir.

Q. You are an engineer, are you not?

A. Yes, sir.

Q. What experience have you had in business?

[91]

A. Oh, we have been in business for the last seven years.

Q. You understood the specifications at the time you examined the ground at the river?

A. Yes, sir.

Q. And you had before you this provision in the contract: "Foundations are to be constructed substantially as shown on the plans"? A. Yes.

Q. "The footing of piers, abutments and wing-walls will be thoroughly imbedded in the bedrock"?

A. Yes.

Q. "It is assumed that the bedrock on each side of the river will be found at a depth shown on the plans; should it be determined that it is necessary to go to a greater depth than this to reach bedrock, this work will be done by the contractor without additional expense to either party."

(Testimony of J. C. Will Jorgensen.)

Q. You had that before you, did you?

A. Yes, sir.

Q. And you understood it? A. Yes, sir.

Q. Now, what did you understand, that it was only an assumption as to the bedrock on the sides of the river? A. Yes, because that is what I could see.

Q. You could see that? A. Yes, just about.

The COURT.—Q. Were there natural conditions there such as enabled you to determine the depth of the bedrock on the sides of the stream?

A. Yes, sir; the bedrock there is *partly* exposed and has been washed off by the prevailing rains, and so on. The natural formation shows.

Mr. CAMPBELL.—Q. And you assumed, then, that you could see the bedrock in the sides of the river, and you assumed that when the plans stated, or rather when the specifications stated, "It is assumed that the bedrock on each side of the river will be found at a depth shown on the plans," but if it should not be so then you had to do the work at your own cost? A. Yes. [92]

Q. And you did not make any examination for the purpose of determining the bedrock in the middle of the river? A. No, sir.

Q. Where you could not find it out?

A. No, sir; I could not find it out. You could do it to a certain extent, by putting down expensive drilling apparatus, thing like that, to get to that depth there, but I concluded, with the line on both sides, with the natural profile of the ground on both sides, conforming so identical with the blue-prints,

(Testimony of J. C. Will Jorgensen.)

I understood there must be some kind of soundings or some kind of evidence put up to the man who made the survey of this thing that would enable him to place the foundation of the center pier within say an inch, or a couple of feet, or something like that, of the location he made.

The COURT.—Q. Within a reasonable distance?

A. Yes, sir.

Mr. CAMPBELL.—Q. You assumed that because of being on the ground and looking at it?

A. Yes.

Redirect Examination.

WITNESS.—There was water at that point in the middle of the river where the center pier was. The width of the main spread over the stream that would be filled in time of flood was about 200 feet.

Recross-examination.

WITNESS.—I did not ask anyone if they had made any soundings.

Q. You were familiar as you say with the specifications? A. Yes, sir.

Q. And the specifications said that you must imbed the piers in bedrock? A. Yes, sir.

Q. And that in any event you were to do all the work that was necessary to be done in that?

A. Yes; in any event, so far as [93] I remember the specifications they said I had to do all the excavating there on both sides of the river for the piers.

Q. What were you to do in the middle of the river, as you call it, for the center pier? Were you not going to do any excavating in that?

(Testimony of J. C. Will Jorgensen.)

A. Yes, I was going to do the work according to the plans.

Q. According to the plans?

A. Yes, sir, to go down to that depth, 27 feet and 6 inches mentioned on the plans.

Q. And you were not to do it according to the plans on either side?

A. Of course I was, but the specifications there says that there might be a loose rock, or something like that, something there. Now, suppose I had to take that rock away in order to get a firm foundation, I had to go down to that and provide a good foundation there.

Q. And you had to go down to what you call the center pier to provide a good foundation there, did you not?

A. I had to go down 27 feet and 6 inches; that is what I figured on.

Q. You believed, at the time that you made this bid, that your contract required you to put all foundations down to bedrock, did you not?

A. Yes, it is a part of the engineer's judgment in forming an arch construction, you have to support all piers to an even bearing capacity, otherwise you would create uneven settlement and that would cause a cracking in the construction.

Q. And you could not see bedrock on either side of the river, or in the center?

A. I could see bedrock on the sides of the river.

Q. You could see it on the sides of the river?

A. Yes, in some places.

(Testimony of J. C. Will Jorgensen.)

The COURT.—Q. How high were the banks?
[94]

A. Well, the banks extended quite high upon both sides; it all depended upon how high you consider the banks.

Q. Was it a torrential stream?

A. Yes, sir; quite a heavy stream in the rainy season and quite calm in the summer season.

Q. It is in the hills, is it not?

A. Yes, sir, in the lower hills.

Mr. CAMPBELL.—Q. How far did you have to excavate on either side to get down to bedrock?

A. In some places according to the plans and in some places below.

Q. I mean how far below the plan?

A. Well, I could not say; some places 6 inches, in other places a foot, and in some places a couple of feet.

[Deposition of H. H. Will Jorgensen.]

The deposition of H. H. WILL JORGENSEN was then offered and read with the understanding that if there was anything in the deposition that went to any issue not made by the pleadings, that plaintiff would not waive the point that no issue was made by the answer, in case none was so made, it appearing that the deposition was taken before the answer was filed, the deposition being in substance as follows:

The witness stated his name as Hans Henry Will Jorgensen.

Born in Copenhagen, Kingdom of Denmark.

Am 30 years old.

(Deposition of H. H. Will Jorgensen.)

Reside in the city of San Francisco.

Have never been naturalized.

Am a citizen and subject of the King of Denmark.

The firm of Jorgensen Bros. is a partnership.

My brother J. C. Jorgensen and myself constitute the partnership.

I am an engineer.

Am a graduate of Chalmers' Technical School at Gennerberg, Sweden. [95]

I am a contracting engineer.

Engaged in that business since December, 1905.

I am familiar with plans and drawings, their meaning and significance.

I know what the marks, lines and other delineations upon plans and drawings are used for by draftsmen.

I can read plans and know what they mean.

The firm of Jorgensen Bros. entered into a contract with the County of Tuolumne on or about the 8th day of December, 1908, for the construction of a bridge.

The construction of the bridge commenced about the 15th of September, 1908.

I personally had charge of the construction up to the time of the completion of the bridge.

The bridge is located on the Stanislaus River at the crossing called Robinson's Ferry.

It is a reinforced concrete bridge.

There are two piers—one pier on the Tuolumne side, one pier in the center of the river and two piers on the Calaveras side.

Prior to the making of this contract the County of Tuolumne had prepared and filed with the County

(Deposition of H. H. Will Jorgensen.)

Clerk and ex-officio clerk of the Board of Supervisors of the County of Tuolumne plans and specifications for the construction of the bridge.

I saw the plans in September sometime.

I was furnished by the County of Tuolumne with a copy of these plans and specifications for the purpose of constructing the bridge.

The witness was then shown a drawing or blue-print marked "Proposed bridge across the Stanislaus River . between Tuolumne [96] and Calaveras Counties, N. J. Pickle, County Surveyor." (This is the same blue-print of plan heretofore introduced in evidence and being No. 5 of "Plaintiff's Exhibit 2.")

(Witness continuing:) This blue-print or drawing is one of a set of plans that were furnished me by the County of Tuolumne for the construction of the bridge. The perpendicular lines near the middle of the drawing represent the pier in the center of the river. The horizontal hachured, or broken lines, represent water out in the river. The white line on top indicates the contour line of the bed of the river. Immediately below the contour line is a number of white dots. They indicate the gravel or mud. Immediately below these dotted white points indicating gravel is another white line running horizontally across the bed of the river; this is a contour line for something below. Below this contour line are some hachured lines, cross-lines, crossing each other; they indicate rock.

Q. Then, from your reading of this plan I will ask you whether or not the marks and lines upon this

(Deposition of H. H. Will Jorgensen.)

plan give the location of the bedrock in that river at the place where this pier in the river is located, definitely, accurately, or otherwise?

A. They indicate it definitely.

Q. Are these plans drawn according to scale?

A. Yes.

(Witness continuing:) The collar of the arch is placed about two feet below the grade of the bridge. The spring line of the arch is the line where the arches start. It is an imaginary line drawn across the construction at a level at the point where the arch starts. Where they abut upon the piers. It is not marked upon the plan. It would fall at the top of the pier about six inches above the coping. [97] This plan and the drawing of this pier in the river upon the plan indicates and represents the depth from the spring line of the arch to the place where bedrock is marked upon the plan. It shows it by scale. The distance from the spring line of the arch to the bedrock as marked upon this plan at this pier in the bed of the river is 27 feet 6 inches. I was in charge of the excavations for the foundation of this pier in the middle of the river. The excavations were carried on with a cofferdam and ordinary sheathing and lagging. We proceeded to excavate here through this place marked upon the plan as gravel and mud, from the bottom of the water down into the gravel.

Q. Now, from the top of the gravel as marked upon this plan to the bedrock as marked upon this plan what was the distance that you were compelled to excavate to this place here where it is marked bed-

(Deposition of H. H. Will Jorgensen.)

rock, the distance you had to go through this gravel to this place here where bedrock is marked upon this plan? A. It was forty-one feet and six inches.

Q. Forty-one feet and six inches.

A. That gravel-bed is not located there; it is located up here. (Indicating.)

Q. I will ask you this question. What is the distance according to the scale of this plan between the top of the gravel as marked upon this plan and the top of the bedrock as marked upon this plan? You understand the question?

A. This plan is not accurate.

Q. I am asking you what the depth of this gravel is here as marked upon this plan?

A. Well, on this plan it is marked something like two feet.

Q. Well, measure it out and tell me what the depth of that gravel is as marked upon this plan right underneath this pier in the river?

A. Two feet six. [98]

Q. When you had carried on your excavations for the foundation of this pier in the river to this place where bedrock is marked upon this plan state what you found there?

A. I found gravel and boulders.

Q. State whether or not you found bedrock at this place where it is marked upon the plan.

A. I did not find bedrock.

(Witness continuing:) N. J. Pickle is County Surveyor of Tuolumne County. He was the agent and superintendent for the County of Tuolumne

(Deposition of H. H. Will Jorgensen.)

having charge of and supervision over the construction of the bridge. He was there giving directions and inspecting and supervising the work. He was present while we were making the excavations. Looking down in the hole. He was there frequently. He was looking over the work, and watching the progress of it.

The County of Tuolumne sent him there. He was supervising the work that we were doing. A short time after—a week or two after—we reached the place where bedrock is marked upon the plan I had a conversation with Mr. Pickle. When we got to this place where bedrock was marked upon the plan we continued our excavations downward. Mr. Pickle could see for himself that we had not found bedrock. I had a conversation with him. He said we had to get to bedrock to get a solid foundation. He requested us to get down to bedrock and to continue our excavations. We found bedrock at 24 feet below the depth found on the plans. When we were making our excavations here we had commenced the construction of other parts of the bridge. We had completed four auxilliary piers to carry the superstructure and part of the superstructure. We had completed the sub-stringers on the two spans on the Calaveras side, and the two spans on the Tuolumne side, next to the respective sides of the river. [99] The bottom of the pier on the Tuolumne side was framed up. We had commenced our excavation for that. Also for one of the piers on the Calaveras side, the second one from the shore. We had been working about a month

(Deposition of H. H. Will Jorgensen.)

and a quarter on the bridge. The fact that we had to continue our excavations downward an additional distance of 24 feet to bedrock increased the cost of the construction of the bridge in the sum of \$7,956.63. This amount was the fair and reasonable value of the additional work. This additional excavation of 24 feet required a time from the 25th of October until the 17th of December, 1908. Mr. Pickle first knew that the bedrock was not at the place where it was marked upon the plan sometime after the 25th of October. He was there off and on; sometimes every week and sometimes every second week. When Mr. Pickle first saw it or knew of it we were four or five feet down below the place where bedrock is marked upon the plan. Mr. Pickle was notified when we reached bedrock. He satisfied himself that bedrock was reached. The supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier. This pier could not have been safely erected on the foundation of gravel and boulders, because the design of this structure indicated foundation in bedrock.

Q. Well, would it have been safe to put the pier upon the gravel and boulders that you found there?

Mr. CAMPBELL.—Anybody knows it would wash out. I will admit that.

A. It might wash out.

Cross-examination.

Mr. CAMPBELL.—Q. You are a member of the firm of Jorgensen *Brother*?

A. Yes. [100]

(Deposition of H. H. Will Jorgensen.)

Q. I show you what purports to be a proposal dated August 26th, 1908, "Jorgensen Brothers" printed and the name signed there "J. C. Wm. Jorgensen," isn't it? A. Yes.

Q. Is that your signature? A. No, sir.

Q. Whose is it? A. My brother's.

Q. He is a member of the firm? A. Yes.

Q. Look at that, please. I will mark it Defendant's Exhibit "A." Is that the bid or proposal made by Jorgensen Brothers to the County of Tuolumne to erect this bridge? A. Yes.

Q. I notice in this proposal that you agree with the owners to erect this bridge according to plans and specifications by Mr. Pickle, County Surveyor; that is so, isn't it? A. Yes.

Q. Had you the specifications before you when you figured on this bridge? A. That, I don't know.

Q. Why don't you know?

A. My brother had charge of that.

Q. You did not put in the figures? A. No, sir.

Q. Did you see the specifications accompanying the plans? A. Not at that time.

Q. Well, at the time you signed the contract?

A. I did not sign the contract.

Q. Your brother signed the contract? A. Yes.

Q. Then, you don't know anything about the specifications upon which the bid was made, do you?

A. Not at that time.

Q. When did you first learn of them?

A. In September some time.

Q. Was that before or after you found out about

(Deposition of H. H. Will Jorgensen.)

the bedrock? A. Yes, it was before that.

Q. Did you make any objections then to the specifications? A. What do you mean by objections?

Q. Well, did you make any objections that the specifications were not full, clear and specific? [101]

A. No, I did not make any.

Q. You did not make any? A. No, sir.

Q. You did a great deal of extra work on this bridge, approaches and other matter and work that was not mentioned in the contract? A. Yes.

Q. You did? A. Yes.

Q. And you put in your bills to the County of Tuolumne for that? A. Yes.

Q. When were you paid for the extra work outside of this that you now claim?

A. From time to time.

Q. Do you remember when the bridge was accepted? A. The 9th of February.

Q. 1910? A. Yes.

Q. You have been engaged in the contracting business in America for how long?

A. Since December, 1905.

Q. You are familiar with plans and specifications?

A. Yes.

Q. You understand plans and read English?

A. Yes.

Q. And your brother has been your partner all of those times? A. Yes.

Q. Now, then, how did you arrive at the amount which you charged for this excavation under this center pier to get down to bedrock?

(Deposition of H. H. Will Jorgensen.)

A. From data and from memory.

Q. What do you mean—that you charged by the cubic yard of excavation, or did you charge by the time used and the wages of the men and so forth—how did you arrive at the exact cost of it?

A. The labor is charged in the exact amount, or as exact as could be stated, and the concrete is charged at so much per cubic yard, and the other bills that we received.

Q. You charged what you say it cost you. The signing of the contract and the figuring on the contract was done by your [102] brother, you say?

A. Yes.

Q. All you did was to superintend the work?

A. Yes.

Annexed to the deposition and made an exhibit to it was the bid of Jorgensen Bros., being “Plaintiff’s Exhibit 5” hereinbefore introduced in evidence.

The following proceedings were then had:

Mr. WEHE.—Gentlemen, I understand the bridge was completed and accepted by the county—it was completed before but it was accepted by the county either in the last of January or the 1st of February, 1910. Will that be admitted?

Mr. SHELTON.—Yes, with the understanding, too, that this stipulation is not in contradiction of the minutes of the Board of Supervisors. We accepted the bridge at the same time that we rejected the claim for extra work for which you sue now. That is correct, is it not?

Mr. WEHE.—No, the bridge was accepted before that time.

Mr. CAMPBELL.—It all came up at one time.

Mr. SHELTON.—It all came up at one time so far as the action of the board is concerned.

The COURT.—You are speaking of the formal acceptance by the action of the Board?

Mr. WEHE.—Oh, yes. But the bridge was used by the public and open to the public toward the last of January, 1910.

It was admitted by the parties that at the request of defendant, plaintiff furnished a bill of particulars, and that the facts stated in the bill of particulars were true, the bill of particulars being in the words and figures following:

“In response to the demand for bill of particulars made by defendant, and without waiving anything at all by compliance with said demand, said plaintiff delivers the following items [103] and dates of actual cost of center pier on bridge described in said complaint below where bedrock was represented to exist on plans submitted to plaintiff by defendant as follows:

Amount expended for labor in the excavation of the shaft to contain the portion of the said pier for which the demand is made in the complaint.....	\$2,913.35
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Said labor does not include the labor for the actual construction of the portion of the pier below said point, the labor therefor being included within the \$12. per cubic yard cost thereof. The pay-rolls for said labor are in our possession and subject to inspection.

Gasoline for running pumps.	300.
Tools, machinery and belting.	350.
Lumber used in cribbing, 15,500 B. M.	310.

This cribbing was of no value after use and was left in the shaft. It was impossible to get it out.

Nails.	10.
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Concrete in center pier below said point 1:6 top 11 feet wide, 36 feet 6 inches long; bottom 12 feet 6 inches wide, length 36 feet 6 inches; average 382 square feet; height of extra portion of pier 24 feet, containing 339.44 cubic yards at \$12 per cubic yard	4,073.28
Total.	7,956.63

The said excavation above mentioned was completed on December 17th, 1908.

The mixing of said concrete and placing of the same in the pier was completed up to the point where bedrock is represented to exist on the said plan by the 21st or 22d of December, 1908. [104]

The entire bridge was completed and ready for delivery on or about the 1st of February, 1910."

Thereupon plaintiff rested, and defendant moved the Court for a nonsuit, and in that behalf made the following statement of its grounds therefor:

Mr. CAMPBELL.—If your Honor please, the defendant now moves the Court for a nonsuit upon the ground that the plaintiff has failed to establish the allegations in the complaint; that their proof has failed to make a case to go to the jury which shows the defendant to be responsible to the plaintiff; they

have shown by their testimony that the contract was an entirety, involving the plans, the specifications and the drawings, if you please. The amount of the contract was agreed upon to be a certain amount, which it is admitted has been fully paid by the county.

It brings us to this proposition; if there is any claim here, and the action must be upon the claim * * * that a person suing the county must sue upon a claim. There was no claim made for damages, that is, there was no claim made to the Board of Supervisors for damages by reason of any breach of warranty on the part of the county or any of its officers. All the claim that was made was for extra work done outside of the contract. This is the only claim that is plead.

The next ground is that they did not present the claim within a year from the time that the work was done, and the material furnished.

Whereupon, after argument, the Court granted the motion for nonsuit, and plaintiff duly excepted to the ruling as provided for by Rule 60 of the rules of this Court.

Inasmuch as the said several matters hereinbefore set forth [105] and inserted in this bill of exceptions do not appear of record, and the plaintiff having, within the time allowed by law, presented the same for settlement and allowance after due notice given, and amendments made thereto, the same is hereby settled and allowed, and made a part of the record in said cause this 30th day of December, 1911.

WM. C. VAN FLEET,
District Judge, Presiding.

[Endorsed]: Filed January 2d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk.
[106]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,

Defendant.

Petition for Writ of Error.

J. C. Will Jorgensen, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Circuit Court of the United States, Ninth Circuit, Northern District of California, predecessor of this Court, made and entered in said court on the 27th day of October, 1911, granting the motion of defendant for nonsuit herein; and the judgment of dismissal and for costs entered in said Court on the 27th day of October, 1911, all in favor of the defendant and against said plaintiff, comes now by F. J. Solinsky, Paul C. Morf and Frank R. Wehe, his attorneys, and petitions this Court for an order allowing him to prosecute a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to review the said decision and judgment of this Court herein, under and according to the Statute of the United States of America in that behalf made and provided,

and that an order be made fixing the amount of a bond for costs said plaintiff shall furnish upon said writ of error.

And your petitioner will ever pray, etc.

Dated this 15 day of February, 1912.

J. C. WILL JORGENSEN,
Petitioner.

By F. J. SOLINSKY,
PAUL C. MORF,
FRANK R. WEHE,
His Attorneys. [107]

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,051.

J. C. WILL JORGENSEN,
Plaintiff,
vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,
Defendant.

Assignment of Errors.

J. C. Will Jorgensen, plaintiff in the above-entitled action by F. J. Solinsky, Paul C. Morf and Frank R. Wehe, his attorneys, hereby assigns the following errors of the Circuit Court of the United States, Ninth Circuit, Northern District of California, the predecessor of this Court, and in which court the said

action was tried, upon which plaintiff will rely in case his petition for writ of error is granted, and which he will urge upon the prosecution of said writ of error in the United States Circuit Court of Appeals for the Northern District of California :

1. The Circuit Court of the United States, Ninth Circuit, Northern District of California, the predecessor of this Court, erred in its decision granting defendant's motion for a nonsuit herein.

2. The said Court erred in entering judgment in this action dismissing the said action.

3. The said Court erred in ordering judgment for defendant for its costs herein.

Dated this 15 day of February, 1912.

F. J. SOLINSKY,
PAUL C. MORF,
FRANK R. WEHE,

Attorneys for Plaintiff J. C. Will Jorgensen. [109]

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,
Defendant.

Order Allowing Writ of Error.

Upon motion of plaintiff and upon filing the petition for a writ of error and assignment of errors herein, it is ordered that a writ of error be, and it is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein and other matters and things in said assignment set forth, upon plaintiff filing a bond herein in the sum of Three Hundred (\$300) Dollars.

Dated February 15, 1912.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. C. Will Jorgensen, said plaintiff, as prin-
cipal, and American Bonding Company of Baltimore,

a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact a surety business within the State of California, as surety, are held and firmly bound unto the above-named defendant, County of Tuolumne, a municipal corporation of the State of California, its successors and assigns, in the sum of Three Hundred (300) Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made each of the undersigned binds himself and itself jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas the said plaintiff has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to review the decision and judgment of the Circuit Court of the United States, Ninth Circuit, for the Northern District of California, the predecessor of the District Court of the United States, Northern District of California, Second Division, made by said Court and entered therein on the 27th day of October, 1911. [112]

NOW, THEREFORE, if the said plaintiff shall prosecute said writ of error to effect and shall answer all costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and effect.

J. C. WILL JORGENSEN.

[Seal American Bonding Co.]

AMERICAN BONDING COMPANY OF
BALTIMORE.

By WALTER W. DERR,
Agent and Attorney in Fact.

Approved:

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Feb. 20, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [113]

*In the District Court of the United States in and for
the Northern District of California.*

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,

Defendant.

**Certificate of Clerk U. S. District Court to Record on
Appeal.**

I, Jas. P. Brown, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing one hundred and thirteen (113) pages, numbered from 1 to 113, inclusive, to be a full, true and correct copy of the record and proceedings in the above and

therein entitled cause, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$66.40; that said amount was paid by Frank R. Wehe, attorney for the above-named plaintiff; and that the original writ of error and citation issued in said **cause are hereto annexed.**

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of March, A. D. 1912.

[Seal]

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [114]

[Citation.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to County of Tuolumne, a Municipal Corporation of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 20th day of March, 1912, being within thirty days from the date hereof, pursuant to a Writ of Error issued in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein J. C. Will Forgensen is plain-

tiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth Judicial Circuit, this 20th day of February, A. D. 1912.

WM. W. MORROW,

United States Circuit Judge.

Service of within Citation, by copy, admitted this 20th day of February, A. D. 1912.

J. C. CAMPBELL,

Attorney for Defendant in Error.

[Endorsed]: No. 15,051. In the District Court of the United States, Northern District of California. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Citation. Filed February 21, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

[Writ of Error.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court, before you, or some of you, between J. C. Will Jorgensen, plaintiff in error, and County of Tuolumne, a Municipal Corporation of the State of California, defendant in error, a manifest error hath happened to the great damage of the said J. C. Will Jorgensen, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 20th day of March, 1912, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge, Northern District of California, this twentieth day of February,

in the year of our Lord one thousand nine hundred and twelve.

[Seal]

JAS. P. BROWN,
Clerk of the District Court of the United States, for
the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. W. MORROW,
Circuit Judge.

Service of within Writ and receipt of a copy thereof is hereby admitted this 20th day of February, 1912.

J. C. CAMPBELL,
Attorney for Defendant in Error.

The answer of the Judges of the District Court of the United States in and for the Northern District of California.

The record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 15,051. District Court of the United States, Northern District of California. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Writ of Error. Filed February 21, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

[Endorsed]: No. 2121. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, a Municipal Corporation of the State of California, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed March 27, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

J. C. WILL JORGENSEN,
Plaintiff in Error,
vs.

COUNTY OF TUOLUMNE, a Municipal Corpora-
tion of the State of California,
Defendant in Error.

Order Enlarging Time to File Record Thereof and to Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause have to and including March 29, 1912, within which to docket the cause and file the Transcript of Record on Writ of Error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 19, 1912.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 2121. In the U. S. Circuit Court of Appeals for the Ninth Circuit. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Order Enlarging Time to File Record and to Docket Cause. Filed March 19, 1912. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk. Refiled Mar. 27, 1912. F. D. Monckton, Clerk.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal
Corporation of the State of California,
Defendant in Error.

No. 2121

BRIEF OF PLAINTIFF IN ERROR.

This case is brought before this Court by writ of error to United States District Court of the Northern District of California, Second Division, for the purpose of reviewing an order and judgment of non-suit entered in said action by the former United States Circuit Court for the Ninth Circuit, Northern District of California.

STATEMENT OF THE CASE.

The action was brought to recover from the defendant the value of certain extra work done in the construction of a bridge spanning the Stanislaus River between the Counties of Tuolumne and

Calaveras, which bridge was erected under a contract made with defendant by Jorgensen Brothers, the assignors of plaintiff in error. The controversy grows out of the fact that the plans published by the County, and which formed a part of the contract, fixed and indicated that the mid-stream pier was 27 feet 6 inches from spring line of arch to bedrock, but when the plaintiff's assignors excavated for the pier it was found to be 51 feet 6 inches (24 feet additional) to bedrock, the contract requiring that all piers should be imbedded in bedrock.

The complaint contains two counts. In the first plaintiff counts on the general assumpsit, alleging the reasonable value of the work to have been Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

In the second count, plaintiff sets out the facts showing the execution of a contract between Jorgensen Brothers and the County of Tuolumne for the construction of a reinforced concrete bridge for the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars, according to certain plans, which provided for a bridge with a mid-stream pier of a definite and specified length and fixing and indicating the distance to bedrock in mid-stream where this pier was to rest, and an ignorance of the contractors as to the error in representation; the allegations going to the extent of alleging a warranty on the part of the County that the bedrock was at a certain depth beneath the

surface. It is then further alleged in this count that when the point indicated on the plans as bedrock was reached in sinking, that no bedrock was found, and that it was necessary to sink an additional distance of twenty-five feet and six inches (proven to have been twenty-four feet) at an additional cost of the said Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

Defendant answered denying all liability for the extra work, and taking the position that the contract was entire, that plaintiff's assignors had stipulated in the contract that all the piers of the bridge should be firmly imbedded in bedrock, and the bridge completed for the contract price of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars.

The plaintiff's claim for the contract price had been paid by the County, but his claim for the extra work was rejected.

A jury was impanelled to try the case, and at the close of plaintiff's testimony defendant moved for a non-suit upon the ground that plaintiff had shown by his testimony that the contract was an entirety.

The Court granted the non-suit, whereupon judgment of dismissal was entered. Hence this appeal.

FACTS.

The Stanislaus River has its source in the Sierra Nevada Mountains, flows westerly into the San Joaquin and becomes the natural boundary be

tween the County of Tuolumne and its northern neighbor, the County of Calaveras.

It appeared in the evidence introduced, going to make up the plaintiff's case, that prior to the 8th day of September, 1908, the County of Tuolumne ordered the construction of a reinforced concrete bridge over the Stanislaus River at Melones (Robinson's Ferry), a point near the western boundary of the two counties, and at a point where the river in the wet season of the year is about two hundred feet wide.

In pursuance of this order, the Board of Supervisors published a notice to contractors asking for bids for the construction of the bridge "as per plans and specifications for the same prepared by N. J. Pickle, County Surveyor," and adopted by the Board of Supervisors of Tuolumne County.

In response to this notice, plaintiff's assignors made a written bid in which they proposed to furnish all the necessary labor, material, scaffolding, etc., for the bridge for the owners according to plans and specifications by Mr. Pickle, County Surveyor, in consideration of the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) dollars.

The plans referred to consisted of six sheets which were admitted in evidence and marked 1 to 6, respectively.

Exhibit 5 is a drawing of the proposed bridge, looking down stream, Calaveras County being on the right and Tuolumne on the left. All the plans

were drawn to scale and this drawing of the bridge represents a total roadway of 349 feet with 2 main spans of 118 feet each. The drawing also plans for four piers, two on the shore on the Calaveras County side, one on the shore on the Tuolumne County side, and one in mid-stream. The drawing also indicates the surface of the water, with a statement "Present water June 6, 1908," and also just below the water line is another statement "Low water." It also indicates the line of bedrock, with the gravel in the bed of the river resting on the bedrock, and with the water above it, and also represents the center pier imbedded in bedrock. On the left hand side of the drawing appears the scale indicating the height of the bridge, and the base of the pier in bedrock as being 27 feet 6 inches below the spring line of the arch. On each side of the plan the bank of the stream is represented, indicating the bedrock as it really exists, and as it appeared to the bidder before making his bid.

Exhibit 3 is a profile and indicates similar details.

Exhibit 6 is a plan of the details of the proposed bridge, and this drawing gives a plan of the parts of the bridge with dimensions, and indicates and fixes the size of the mid-stream pier, giving its height from base to spring line of arch, and from spring line to floor of the bridge, the distance from spring line of arch to the base of the pier at bedrock being represented on this plan by numerals as being 27 feet and 6 inches.

The contract executed between defendant and plaintiff's assignors contained appropriate recitals,

and then provides that "In consideration of the premises, and a further consideration of the sum of \$16,775.00, to be paid by the party of the first part, as hereinafter expressed and provided, the parties of the second part * * * promise and agree with said party of the first part that they will honestly and faithfully perform the work herein referred to * * * ." That "the party of the first part covenants and agrees to pay, or cause to be paid to said parties of the second part during the progress of said work, and when the same shall have been completed and accepted as hereinafter provided, the sum of \$16,775.00 * * * ." That the plans and specifications filed with the County Clerk shall constitute a part of this contract, and that "said construction, erection and work, shall be done and completed in a good and workmanlike manner, according to said plans and specifications."

The specifications referred to in the contract, so far as material here, were as follows:

"The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.

The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.

The dimensions of this reinforced bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

* * * Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

Foundations are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bedrock. It is assumed that the bedrock on each side of the river will be found at a depth shown on plans. Should it be determined that it is necessary to go to a greater depth than this to reach bedrock this work shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure."

J. C. Will Jorgensen, the contracting brother who presented the bid, visited the ground in accordance with the direction of the specifications, and testified that he found that "it compared pretty fairly with the nature of the ground, the conformation of the ground, the presence of bedrock, as

compared with the sheet marked 'Details of proposed bridge,' " and that it gave him the impression that the profile he received "was made according to the natural conditions." (Tr., pp. 82 to 88, inclusive.)

That the portion of the pier of the river where the mid-stream pier was to be located was covered with water.

From the deposition of H. H. Will Jorgensen it appears that he was in charge of the excavation for the foundation of the mid-stream pier. That the excavations were carried on with a coffer-dam. That when they reached the point marked bedrock on the plans, bedrock was not found and they continued their excavations downward. (The pleadings admit that N. J. Pickle, County Surveyor of the County of Tuolumne, was Superintendent of the defendant, in charge of the work.) That about the time that further excavation downward was continued, the witness had a conversation with Mr. Pickle. "He (Mr. Pickle) said we had to get to bedrock to get a solid foundation. He requested us to get down to bedrock and to continue our excavations." Bedrock was found at 24 feet below the depth indicated on the plans.

This witness further testified that "The fact that we had to continue our excavations downward an additional distance of 24 feet to bedrock increased the cost of the construction of the bridge in the sum of \$7,956.63. This amount was the fair and reasonable value of the additional work."

The witness further testified "Mr. Pickle was notified when we reached bedrock. He satisfied him-

self that bedrock was reached. The Supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier.”

It was admitted that it would not have been safe to have put the pier upon the gravel and boulders that were found there. (p. 94.)

SPECIFICATION OF ERROR.

Appellant assigned as errors:

1. That the lower Court erred in its decision granting defendant's motion for a non-suit.

2. That the Court erred in entering judgment in the action dismissing the action.

3. That the Court erred in ordering judgment for defendant for its costs.

These assignments are all comprehended within the specification that the Court erred in granting the non-suit.

The motion for non-suit was made under Rule 60 of the Rules of the United States Circuit Court for the Ninth Circuit, which provided that “The defendant in an action at law, tried either with or without a jury, may either at the close of the plaintiff's case or at the close of the case on both sides, move for a non-suit. The procedure on such motion shall be as follows: The defendant, or his counsel, shall state orally in open Court that he moves for a non-suit on certain grounds, which shall be stated specifically. Such a motion shall be deemed and treated as assuming for the purposes of the motion (but for such purposes only) the truth of whatever the evidence tends to prove, to wit, whatever a jury

might properly infer from it. If, upon the facts so assumed to be true as aforesaid, the Court shall be of opinion that the plaintiff has no case, the motion shall be granted and the action dismissed.”

In determining the question as to whether or not plaintiff has made a case, it is the duty of the Court to take that view of the evidence most favorable to the party against whom the instruction is desired, and from that evidence and the inferences justifiable to be drawn therefrom, say whether there is any evidence which would reasonably justify a finding for that party.

Milwaukee Mechanics' Ins. Co. vs. Rhea & Son, 123 Fed. 9-12. (Opinion of Lurton, C. J.)

Mt. Adams vs. Lowery, 74 Fed. 463.

The above cases are cited by the Supreme Court of Nevada, opinion of Sweeney, Judge, in the case of Burch vs. Southern Pacific, 32 Nev. 125-134, where the Court say:

“The rule has been well established in this and other courts, that in considering the granting or refusing of a motion for non-suit the Court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and every inference of fact that can be legitimately drawn therefrom, and give the plaintiff the benefit of all legal presumptions arising from the evidence and interpret the evidence most strongly against the defendant.”

See also:

Goldstone vs. Merchants Ice etc. Co., 123
Cal. 625;

Hanley vs. California Bridge Co., 127 Cal.
232.

It is therefore apparent that if upon any theory of the law, when applied to the facts the evidence fairly tends to prove, plaintiff has a case, the Court will reverse the judgment and order a new trial of the action.

This will limit the discussion to the ground of non-suit that the contract was entire, and the conclusion drawn therefrom by defendant's counsel that under the contract plaintiff's assignors undertook to erect a mid-stream pier of indefinite dimensions with its footing imbedded in bedrock, regardless of the depth at which the bedrock might be found, in entire disregard of the representations made by the County and the circumstances under which the contract was made, insofar as those representations would tend to show that the minds of the contracting parties met only upon the construction of a bridge which should have its mid-stream pier imbedded in bedrock at a distance of not to exceed 27 feet 6 inches below the spring line of the arch, the spring line of the arch being an imaginary horizontal line drawn lengthwise the structure at a point where the arches rest upon the crown of the piers.

BRIEF.

It was never contemplated by the contracting parties that the extra work made necessary by the contract should be included within the contract price.

In making the contract, the minds of the parties met only upon the proposition made by the County, and accepted by plaintiff's assignors, that bedrock, at the point where the mid-stream pier of the bridge was to be imbedded, was 27 feet 6 inches below the spring line of the arch. There is no hint in the plans or specifications, nor in the circumstances surrounding the negotiations, that would tend to warn the bidder that bedrock at this point was or might be a distance of 24 feet lower in depth, which would thus increase the price of the bridge to more than \$24,000, instead of the sum of \$16,775, the price bid, nearly one-half more.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting.

C. C. Cal., Sec. 1636.

The first and controlling rule of construction is to ascertain what was the intention of the parties at the time of the making of the contract.

Stockton Sav. & L. Soc. vs. Purvis, 112 Cal. 236-238.

In the case cited the Court held that title to personal property was in the person mentioned in the contract as the lessee, notwithstanding the express stipulation in the contract that the title to the property should remain in the person named in the contract as the lessor.

Courts, in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.

Nash vs. Towne, 5 Wall (U. S.), 689-704,
18 Law Ed. 527-529.

A contract may be explained by reference to the circumstances under which it was made.

Sec. 1647, C. C. Cal.

The subject matter of a contract may be shown by parole evidence of the surrounding circumstances.

U. S. vs. Peck, 102 U. S. 64, 26 Law Ed. 46.

In the case last cited the party was allowed to introduce the circumstances under which the contract was entered into for the purpose of showing that the conduct of the agents of the government led him to rely upon a particular means of fulfilling his contract until it was too late to perform it in any other way.

In the contract at bar the circumstances surrounding it, that is to say, the facts: that the bridge was to be built at a particular point and across a river which was a boundary of the County making the contract, and with the conditions of which it could be fairly assumed the officers of the County

were familiar; that bids were called for to build the bridge at this particular spot and in accordance with the plans and specifications which were made a part of the contract, and which were made by the Surveyor of the County making the proposal; that in the specifications the contractor was requested to "view the proposed work on the ground and judge of its nature and character before presenting bids; that a view of the proposed work on the ground and its nature and character so far as could be determined by *view*, agreed substantially with the plans and drawings set out; that the plans provided for a pier, its base hid in the water in mid-stream, the distance of which to bedrock could not be determined in any other way than by taking the representations of the plan, except at great expense, which expense was not contemplated by the proposal; that, according to the drawings and plans, the bedrock immediately under the mid-stream pier is positively and comparatively shown; that the mid-stream pier is shown by the plans and drawings with its base resting upon and imbedded in the bedrock; that the plans fix the height of the mid-stream pier from the spring line of the arch to bedrock according to a scale and in figures at 27 feet and 6 inches; that the same plan which fixes the height of the mid-stream pier fixes its width, its thickness, its shape and also the like dimensions of all other portions of the bridge; and, besides, that the drawing of the profile of the bridge indicates the depth of water, giving the date as "Present water, June 6, 1908", also indicates the point of low water and the depth of gravel beneath the water and on

the bedrock, all with painstaking exactness—all would tend to lead any ordinary mind into the belief that conditions were exactly as shown upon the plans. Especially would this belief arise in the mind of one who, in accordance with the instructions contained in the specification, viewed the proposed work on the ground and attempted to judge of its nature and character before presenting his bid, as was done by one of the contractors in the case at bar, and who (plaintiff) testified that he “concluded, with the line on both sides, with the natural profile of the ground on both sides, conforming so identical with the blue prints, and understood that there must have been some kind of soundings or some kind of evidence put up to the man who made the survey of the thing that would enable him to place the foundation of the center pier within, say an inch, or a couple of feet, or something like that, of the location he made,” and that he “assumed it because of being on the ground and looking at it.” (pp. 85-86.)

Similar instructions for personal examination of the location of the proposed work were construed in the case of *Horgan vs. Mayor*, 55 N. E. 204 (N. Y.). The contract in that case contained the provision that “bidders must satisfy themselves by personal examination of the location of the proposed work and by such other means as they may prefer as to the accuracy of the foregoing engineer’s estimate.” The contract was made with the City of New York to furnish and provide all necessary materials and labor and excavate, remove and dispose of all silt, sediment and other materials

deposited in the bottom of a pond in the city and to construct a concrete bottom over same. Subdivision 1 of the contract provided that the plaintiff should furnish "all labor and materials required for conducting the flow of water and draining off the water from the bottom during the prosecution of the work." The controversy arose over a claim for extra work for pumping out the pond, it appearing that when the contractor attempted to run the water out of the sewer, the sewer was blocked and failed to carry off the water. The plaintiff made a personal examination of the location of the proposed work as required, and on this feature of the controversy the Court say:

"The question that lies at the threshold of this case is, did the city owe the duty to the plaintiff of having the outlet pipe of this pond in working order? The contention of the learned corporation counsel is that by the terms of this contract the plaintiff was bound, by his personal inspection of the location of the proposed work, and by Subdivisions 1, 2 and 5 of the specifications already quoted, to remove all the water in the pond, if necessary; in other words, that, if the outlet pipe had been so obstructed as not to draw any water from the pond, it was nevertheless incumbent upon the plaintiff to have removed it in some manner. We do not think this is a reasonable construction of the contract. It was, of course, impossible, when the plaintiff went upon the ground, to examine the proposed work to see more than the outlet gate, and the size thereof. Whether

the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises. A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water, in a general sense."

The case of *Smith vs. Salt Lake City*, 83 Fed. 785-787, is persuasive as to the position of plaintiff. In that case the city made a proposal for bids for the construction of an aqueduct and required the work to be done in accordance with plans and specifications, which plans were accompanied by instructions to bidders. A controversy then arose as to a recovery for extra work on account of the actual material necessary far exceeding the quantity specified, and in discussing the effect of the city inviting proposals according to plans and specifications, the Court say:

"A survey of the line of the proposed aqueduct and an estimate of quantities was essential to intelligent action in the premises. No bid could be made, nor could a contract for the work, without such survey and estimate. The city could have required bidders to make their own survey, but that course was not adopted. In a published notice the city invited proposals for building the aqueduct according to plans and specifications in the office of the City Engineer. Upon this notice plans and specifications were shown to bidders and it must be said that any attempt on the part of the city to limit their use is unavailing."

Further on in the case the Court discusses the presumptions arising from the survey as appeared by the plans and specifications, and then further said that it was not necessary to say that this presumption was conclusive.

The Court concluded (p. 787) that there was a material departure from the plans and specifications which resulted in a new and different undertaking upon which plaintiffs were entitled to recover the value of the work done by them in excess of the contract.

This construction of the contract in the light of the circumstances under which it was made, is emphasized by the opinion of Sanborn, Circuit Judge, speaking for the Court on the appeal in the same case.

See *Salt Lake City vs. Smith*, 104 Fed. 457, 462.

With reference to the contract in that case the Court say:

“When they settled upon the terms of this agreement, they were considering a conduit laid in an open trench 6 or 8 feet deep, ‘at such depth below the surface as will insure it against the effects of frost,’ as the instructions to bidders read, over a comparatively level surface, requiring materials and work of about the quantities estimated by the engineer, and of a character necessary for the construction of such a work. This was the conduit described in the plans and specifications upon which the bid of the contractors and the contract itself were based, and this was the contract which

the parties contemplated, and upon which their minds met when they made their agreement. This plain fact limits every stipulation of the agreement, and in its light and in the light of reason every provision of this contract must be interpreted."

The purpose of publishing the proposal asking for bids on the bridge as per plans and specifications was to enable bidders to estimate the cost of the bridge, and the plans and specifications, and the details in the way of measurements, sizes, shapes, conformation of the ground, position of bedrock, depth of water, etc., were representations of material facts made by the County, and would naturally mislead as to price.

For additional authorities see:

- Delafield vs. Town of Westfield, 28 N. Y. Supp. 443;
- Langley vs. Rouss, 82 N. Y. Supp. 1085;
- McKnight vs. Mayor of New York, 54 N. E. 661;
- Wyandotte etc. Ry. Co. vs. Bridge Co., 100 Fed. 197-204;
- Genoty vs. Mayor of New York, 63 N. E. 804;
- Sexton vs. Chicago, 107 Ill., 332-333;
- Becker vs. New York, 63 N. E. 298;
- Chicago vs. Sexton, 2 N. E. 266-267;
- Chicago vs. Duffy, 75 N. E. 912;
- Cook County vs. Harms, 108 Ill., 158;
- O'Neil vs. Milwaukee, 98 N. W. 965.

The only attempt made by the County to in any way qualify the exactness of the plans is in the statement that the depth of bedrock on *each side*

of the river is "assumed" to be as shown on plans and that should it be determined that it is necessary to go to a greater depth "than this" to reach bedrock, *this work* shall be done by the contractor without additional expense. Then follows the statement that in any event the contractor is to do all necessary excavation. Nothing, however, *is said* in the specifications about the bedrock in midstream, and had there been no representation at all as to bedrock in mid-stream, or if the plans had been drawn in such way as to show or to give a hint that bedrock in mid-stream was not known, probably from the statement that the bedrock on each side of the river was assumed to be at the depth shown could be gathered the intention of the County to inform the bidder that nothing at all was known about the bedrock in mid-stream, but such is not the situation. Where the bedrock is in plain sight and easily ascertained, they express a knowledge by assumption, but where it *afterwards* transpires that the depth is unknown, the bidder is left to the presumptions which must be drawn from a measurement made on the plans. He was asked to view the ground with the knowledge on the part of the County that a view of the ground would exhibit nothing but the sides and the surface of the water.

The length of the mid-stream pier to bedrock is as much a part of the "dimensions" of the bridge as any of it.

The rule that the hazard of an undertaking is assumed by the contractor and that he cannot recover for increased cost as extra work upon discovering that he has made a mistake in his estimate of the cost, or that the work is more difficult and ex-

pensive than he anticipated (30 A. & E. Ency. 1279) only applies to contracts such as the contract in *Hennessey vs. Fleming Bros.* (Col.), 90 Pac. Rep. 77, and other cases of like character cited by the defendant in the Court below, that is cases where the contractor makes a contract to complete a structure and no representation is made and the contractor is not misled as to material facts which enter into the estimate of cost, and which facts are as open to the inspection or knowledge of one contracting party as the other; but none of those cases in which this rule is invoked cover the case at bar. In this case one of the contracting parties assumed to know, and by its drawing and plans represented the exact location of bedrock, and in view of this representation secured the stipulation that *all* the piers should be imbedded in bedrock and the bridge completed for a certain price of \$16,775—a price which the evidence creates no inference against as being largely disproportionate to the actual cost of the bridge. The facts clearly show that this stipulation enforces a loss of the amount claimed upon plaintiff, unless he has some remedy in this case. Surely if defendant had made the representation purposely and with the intention of misleading plaintiff's assignors into making an improvident contract, it would have been a fraud upon them and the action of deceit would lie. If so, is not the defendant liable where the same result follows from its act, although there is no evidence that it was intentional? Does not the situation give rise to the contract implied by the law to fit just such cases and to enforce payment on the theory of contract, be-

cause by reason of the contractor being misled it becomes the duty of the County to pay for the bridge that it actually got? There being no question in the case but what the bridge the County accepted was worth the amount demanded more than the bridge represented on the plans.

See:

Hertzog vs. Hertzog, 29 Pa. St. 468;

Sceva vs. True, 53 N. H. 630;

Trower vs. City and County of S. F., 157 Cal. 766;

Wyandotte vs. King Bridge Co., 100 Fed. 203, 204.

“Corporations, quite as much as an individual, are held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced.”

Zabriskie vs. Cleveland R. R. Co., 23 How. 381, 16 Law Ed. 488.

No precise rule for determining when a contract is separable or entire can be given in all cases. It depends upon the intention of the parties.

See State vs. Jones, 21 Nev. 513.

In the case at bar, if the written contract alone is considered, aside from the circumstances under which it was made, and without construing it with the specifications, it must be conceded that the contract is entire insofar as on its face it demands the construction of the bridge for \$16,775. But to thus state the proposition evades the question in the case. When the parties contracted for the construction

of the bridge, there was in the minds of the parties a bridge, with all of its parts pictured on a plan drawn to scale. It was a bridge of certain dimensions, its length was stated, its width was stated, and the same representation which warranted the length warranted the distance to bedrock of the mid-stream pier, or the length of that pier, whichever way it is put. Therefore it is not a question of whether or not the contract is entire, in that it requires the completion of the entire bridge as a condition precedent to its acceptance as a fulfilled contract, but has the defendant so conducted itself in representing the dimensions of the bridge that plaintiff's assignors were misled into bidding for and binding themselves to construct a bridge, which was not in contemplation at the time of contracting, at a cost far in excess of the contract price. It does not appear to be a contract where the contractor assumed a hazard. The conduct of the defendant represented a certainty and not a hazard, and upon that representation the bid was made. The conduct of the defendant would enable it to get a \$24,000 bridge for \$16,000, dealing in round numbers. Certainly its conduct in a sense estops it to dispute that the items are separable.

It is not always necessary that the misrepresentation be wilful. The effect upon the party is the same in either event.

See *Seymour vs. Oelrichs*, 156 Cal. 782, 796.

In the case last cited, the Court held the party estopped to assert the statute of frauds in a case where the conduct of the party himself misled the other party to his detriment. The Court say: "It

is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct, an actual intention to mislead is not essential," and quoting from the case of *Anderson vs. Hubble*, 93 Ind. 570, 576, "All that is meant in the expression that an estoppel must possess an element of fraud is, that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or *suffered* another to believe and take action upon." (Italics added.)

False representations may be by acts as well as words.

See Bigelow on Fraud, Sec. 467.

It seems fair to assert that when the county by its drawing, in effect, informed plaintiff's assignors that the dimensions of the mid-stream pier as to length were 27 feet 6 inches from spring line of arch to its base, and further represented it as imbedded in bedrock, thus inducing a contract with plaintiff's assignors for the construction of the bridge requiring them to imbed the piers in bedrock and complete the bridge for \$16,775, that the minds of the parties did not meet upon the element of the hazard of constructing the bridge and completing it, regardless of where the bedrock existed, which would be necessary in order to maintain that the contract is entire as to the extra work, and that as to this extra work the minds of the parties never met; and inasmuch as the County accepted the bridge with a knowledge of all the facts, and its own superintendent insisted on the clause of the contract compelling the plaintiff's assignors to go

to bedrock, that defendant should be compelled to pay to the extent of the benefit it has thus received, under the same general rule of law which authorizes the recovery of money not justly due to the payee but paid by compulsion.

Trower vs. City and County, 157 Cal. 762, 767.

The fact that the falsity of the representation may not have been intended cuts no figure.

It has been stated as a familiar principle of law that where a party affirms either that which he knows to be false, or does not know to be error, to another's loss and his own gain, he is responsible for the injury.

Lobdell vs. Baker, 1 Metcalf, 193 (35 Am. Dec. 358)

citing as authority Adamson vs. Jarvis, 12 Moore, 241.

See Civil Code California, Sec. 1572, subd. 2;
Mayor vs. Salazar, 84 Cal. 646.

This representation was not qualified by anything contained in the contract, plans or specifications, and the language of the contract "In any event the contractor is to do all necessary excavations" added nothing to the contract as a qualifying feature of the drawing. Particularly is this so when it is noted that in the context it immediately follows the stipulation "Should it be determined that it is necessary to go to a greater depth than *this* (the depth as shown on plans as to bedrock on each side of the river) to reach bedrock, *this work shall be done by the contractor without additional expense to either County*. Every expression and feature of the con-

tract is consistent with the idea and representation that bedrock under the stream is exactly as pictured on the drawing, Exhibit 5, and that the height of the pier from bedrock to top is as detailed in Exhibit 6.

In principle, the case of *McConnell vs. Corona City Water Company*, 149 Cal. 61, is on all fours with the case at bar. In that case the contract provided for the construction of a tunnel to completion, and that the tunnel should be timbered in a thoroughly workmanlike and practical manner so as to protect it from outward as well as inward pressure. The specifications provided that the tunnel should be constructed according to the specification of the engineers, and during the construction of the tunnel it was driven and timbered under the directions and specifications of the engineers of the defendant, and the defendant furnished the timbers. Thus it will be seen that the contract was entire. The tunnel caved during the construction and was repaired by the contractor. The action involved the repayment of the cost of the extra work. The point was made there, as here, that the contract was entire, that the contractor had bound himself to furnish a complete tunnel. To this the Court say:

“If the question were whether the contract for the construction of this tunnel was entire and indivisible, there would be no hesitation in saying that it was. But this conclusion does not advance us in the determination of the real question in dispute between the parties. That question may be thus stated: Treating the con-

tract as entire, was the extra work necessitated by the caving of the tunnel, work within the contemplation of the contract, for which, therefore, the contractor was entitled to no remuneration, or was it work without the contemplation of the contract, for the doing of which he is entitled to compensation? To answer this question, in addition to the provisions of the contract, resort must be had to the evidence. First, as to the terms of the contract, it will be noted that while the contractor agrees to timber in a thoroughly workmanlike and practical manner, so as to protect against outward and also inward pressure, he is controlled in this by the further provisions that the tunnel is to be constructed according to the specifications of the engineers of the company in charge of the work, and that the material for timbering is to be furnished him by defendant. The evidence shows that the plaintiff did drive the tunnel and timber it under the directions and specifications of the supervising engineers of defendant; that progress payments were made upon the certificate of the engineers of the completion according to the terms of the contract of certain portions of the tunnel; that the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; that he was obliged to use the inferior lumber which was furnished; and that the timbering was done

under the directions of and to the satisfaction of defendant's engineers. Under such circumstances, notwithstanding that the contract is indivisible, there can be no hesitation in saying that the contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell, that the responsibility for such accident must rest on the defendant, and that, notwithstanding that the contract was entire and indivisible, plaintiff was under no more compulsion to perform the extra work of repairing the cave in the tunnel so occurring than he would have been if it had been occasioned by a willful act of destruction upon the part of the defendant. The work became necessary to enable the contractor to proceed under his contract. It was occasioned by the failure of the defendant to furnish suitable timbers and by the mistake of their engineers as to the strength of the timbering required. As the contractor was doing his work under the directions and specifications of those engineers he cannot be held responsible for their errors or miscalculations."

It is apparent that under the facts of the case cited, the tunnel could not have been completed without repairing the cave, and the conduct of the defendant was largely responsible for the cave. Applying the case here, the furnishing of the extra work and material to construct the pier to bedrock a distance of 24 feet further than contemplated by

the contract was necessary in order to complete the bridge as provided for in the contract, and defendant was responsible for the fact that the estimate of cost did not cover this expenditure.

The discrepancy might easily have been 50 feet instead of 24 feet, and thus have more than doubled the cost of the bridge to the contractor. It surely could not have been contended that this was contemplated by the contract, and the result would have been so disastrous and shocking that surely a remedy would have been found other than the claim that this would have made the contract impossible of performance, which would have justified the plaintiff's assignors in abandoning the contract without forfeiting their bond.

It is respectfully submitted that the judgment should be reversed.

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No. 2121

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

J. C. WILL JORGENSEN,

Plaintiff in Error,

VS.

COUNTY OF TUOLUMNE (a municipal
corporation of the State of California),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FURTHER STATEMENT OF CASE.

Section 1. Facts.

Before proceeding with the brief, we wish to add a short supplement to the statement of case made by plaintiff in error, in his brief. True enough, plaintiff in error testifies that he visited the site of the proposed bridge and that it "compared pretty favorably" with natural conditions. He further testified (Tr., p. 85) that he could see that the plans were "only an assumption as to the bedrock on the sides of the river"; nevertheless, he made no in-

quiry to determine whether or not the representation of the middle pier on the plans was not an assumption also; "I did not ask any one if they had made any soundings" (Tr., p. 86). The bill of exceptions shows likewise that plaintiff in error had before him the specifications when he made his bid, and had read the provisions requiring all piers and foundations to be constructed in bedrock (Tr., p. 84), and understood when he made the contract that the terms of the contract would require him to do so. .

"Q. You believed at the time that you made this bid that your contract required you to put all foundations to bedrock, did you not?

A. Yes; it is a part of the engineer's judgment in forming an arch construction; you have to support all piers to an even bearing capacity, otherwise you would create uneven settlement and that would cause a cracking in the construction." (Tr., p. 87.)

It further appears from the testimony of H. H. Will Jorgensen, the partner who had charge of the work, that on the 25th day of October, 1908, while excavating, he reached the place where bedrock was marked upon the plans and failed to find the bedrock as represented; that he had a conversation with Mr. Pickle, the County Surveyor, who was supervising the work for the county, and that Mr. Pickle required him

"to get to bedrock to get a solid foundation; he requested us to get down to bedrock and to continue our excavation." * * * "Mr. Pickle was notified when we reached bedrock. He satisfied himself that bedrock was reached. The

supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier.” (Tr., pp. 93, 94.)

The excavation below the point where bedrock was shown on the plans, was completed on December 17, 1908, and the construction of the pier was completed up to the point where bedrock was located on the plans, on the 21st or 22nd of December, 1908 (Tr., p. 99).

When requested to proceed with the work in controversy, so far as the record shows, plaintiff in error and his partner never claimed that this work was not required by their contract, or was not included within its terms, or that they regarded it as extra work for which they would expect extra compensation. The record further shows that plaintiff in error and his partner put in claims for extra work from time to time during the construction of the bridge (Tr., p. 96), but the claim here involved was never made or presented until after the bridge was completed, on February 4, 1910, more than a year after the work in controversy had been performed (Tr., pp. 77-80), and after the payment of the first installment, which became due when the first half of the bridge was completed (Tr., pp. 62, 63). In the sworn claim it was admitted that the demand sued on here was more than a year old when presented to the Board of Supervisors, by making claim for a year's interest (Tr., p. 78).

BRIEF.

Section 2. Introductory.

Although the brief of plaintiff in error is written for the most part upon the theory that the work and materials sued for are outside the scope and terms of the contract involved, it is not confined to that theory but treats the case as though it was one for breach of warranty, or for damages caused by material misrepresentation in making the contract. The case cannot be both. It must be one or the other, because a warranty or misrepresentation is not a part of the undertaking imposed by the contract, but is wholly collateral to it and therefore cannot define its scope or terms. If the work done is within the scope of the contract, the case must be for breach of warranty or tort for fraud and deceit, if anything. If, on the other hand, the work sued for is not called for by the terms of the contract, there can be no breach of warranty or misrepresentation. The warranty or misrepresentation claimed is, that the plans showed all the work required under the contract. If, therefore, the work sued for is outside the contract, that representation or warranty is true and there is consequently no breach. In that event, the case must be upon implied contract, if anything.

From this brief statement it can be readily seen that it will be our purpose, in the first place, to show that the contract involved, which is admitted to be an entirety, requiring the delivery of a com-

pleted structure, was sufficiently broad in its scope and terms to include the work and materials here sued for, so that payment of the contract price constituted payment for such work and labor; that such work and labor was within the contemplation of the parties under a fair construction of the contract, which must be construed in favor of the defendant county in case of doubt, and further that such work and materials were treated as within the scope of the contract by the parties in the course of performance, and that this practical construction put upon it by the parties will be followed by the court. We will also endeavor to establish the proposition that if the work and materials were within the terms of the contract, plaintiff in error cannot recover at all, for the reason that in order to succeed he would have to establish either a breach of warranty or a case of fraud; that the case made does not establish a warranty because the representations in the plans are matters of description and not of warranty, under a fair construction of the contract, and that there can be no cause of action for fraud because a county is not subject to such an action, and for the further reason that even if the representations in the plans could constitute a warranty or a fraud as to the location of the bedrock, the cause of action arose and was barred by the statute of limitations before the claim was presented to the Board of Supervisors. And finally, it will be our purpose to show that even if the work and materials involved here were outside the contract,

still there is no cause of action because, under the positive prohibitions of our statutes there can be no implied contract against a county for work and materials of this kind; and, to conclude, even though an implied contract should be raised, in a case like this such contract arose and was barred by limitation before the claim thereon was presented to the Board of Supervisors.

Section 3. Labor and Materials Sued for Included Within and Required by the Terms of the Contract.

The first point to be determined in the decision of this case is whether or not, under a proper construction, the contract in suit bound plaintiff in error to perform the work and furnish the materials here involved. We do not believe it will be disputed that the contract in this case calls for a completed structure in consideration of a lump sum, for the contract expressly provides that its purpose is "to provide a complete structure", and that the bridge when completed "shall be constructed to support with safety at least a live load of twenty tons concentrated on any sixteen square feet of deck". The question at issue is, whether the scope of these and other like general provisions of the contract and specifications is limited and controlled by the inaccurate representation on the plans showing the middle pier shorter than it really was.

It is clear from the express terms of the specifications that it does not. The specifications say: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, must be done as though shown or mentioned in both". In view of this provision can it be doubted that it was the intention of the parties that the drawings and specifications should only complement each other, and that in no sense of the word should one ever be so construed as to limit or restrict the other. The specifications required all piers to be of sufficient length to reach from the bridge to the bedrock. The bridge, to be a bridge and carry a load of twenty tons on any sixteen square feet of deck, must have piers for support and "the footings of piers, abutments and wingwalls will be thoroughly imbedded in bedrock". Can the failure of the drawings to represent correctly the distance to bedrock, so limit and control a bridge contract in this most fundamental respect, that it can be performed without the construction of complete and serviceable piers? We think not. Furthermore, the specifications expressly negative any intention on the part of the parties to the contract that the drawings or plans should be controlling on this point. It is provided: "Foundations are to be constructed substantially as shown on plans. The footings of piers, abutments and wing-walls will be thoroughly imbedded in the bedrock. It is assumed that the bedrock on each side of the river will be

“ found at a depth shown on plans. Should it be
 “ determined that it is necessary to go to a greater
 “ depth than this to reach bedrock this work shall
 “ be done by the contractor without additional ex-
 “ pense to either county. In any event the con-
 “ tractor is to do all necessary excavations.” Founda-
 tions, which of course include the footings of
 piers, are not by the terms of the contract to be
 constructed according to the scale shown on the
 plans or drawings, but are to be “constructed *sub-*
stantially as shown on plans”. This clause makes
 it clear that the scale of drawings on this point is
 not to be all controlling, but is merely descriptive
 or representative.

It is expressly stated in the specifications that as
 to those matters of which the county could be as-
 sumed to have knowledge, the plans were not accu-
 rately drawn so far as the bedrock is concerned:
 “ It is assumed that the bedrock on each side of the
 “ river will be found at a depth shown on plans”.
 This quotation expressly negatives any inference
 that the plans correctly represent the bedrock at
 those places where its location could be accurately
 and conveniently ascertained. Having shown that
 it was not the purpose of the plans to represent
 accurately facts easily ascertained and probably
 within the knowledge of the parties, how then can
 it be assumed that it was the purpose of the plans
 or drawings to represent accurately the location of
 bedrock in the middle of the stream, when knowl-
 edge of this fact could not be ascertained except at

great expense? In other words, it could reasonably be assumed by the contractors here that the county had information in its possession as to the bedrock upon the sides of the stream where it was exposed to open view. Where such an inference could reasonably be drawn, the contract negatives by express terms any intention to represent it accurately, thinking of course, it seems to us, according to the true construction of this contract, that no one could ever assume that the county had gone to the expense of excavating in the middle of a stream covered by water, to determine definitely where the bedrock was located, merely for the purpose of accurately representing that fact upon the drawings.

Turning now to the authorities on this point, we have chosen a few cases similar to the one at bar in support of our contention. The case of

Stuart v. Cambridge, 125 Mass. 102,

deals with a state of facts practically identical with those at bar. Under a contract for a complete and entire structure, the specifications required the contractor to go to a firm and solid foundation. The plan showed a depth of fourteen inches. In the course of construction it became necessary to excavate much more than shown on the plan, and to use piles in support of the foundation. Upon this showing, the plaintiff there sought to recover for extra work, but his claim was denied by the highest court of Massachusetts, in the following language:

“By the fair construction of this contract, the plaintiffs agreed to do all the work neces-

sary to drive piles in order to secure such foundation. The ruling of the Superior Court as to the construction of the contract was therefore correct.

“The evidence offered by the plaintiffs, that they made their estimate according to a plan made by the defendant’s architect, showing a section of the wall which required only a depth of fourteen inches, and did not require any piles, and that it was customary for other persons engaged in the same business to make estimates in similar cases in the same manner, was incompetent, because it tended to control and vary the written contract.”

To the same effect is the case of

Wear Bros. v. Schmeltzer, 92 Mo. App. 321.

The case of

Early v. O’Brien, 64 N. Y. Supp. (App. Div.) 848,

is a good illustration of how plans and drawings are controlled by the specifications. In that case the specifications provided that the walls should be of certain construction and that “great care must be taken to render the walls perfectly water-tight”, but the drawings required that they be six inches thick, and it was there held:

“That the indication in the drawing of the proposed thickness of the floor was controlled by the provision of the specification, and that the contractor was bound to make the cellar water-tight even if it was necessary to make it thicker than six inches.

“Here was an express obligation to furnish a water-tight cellar, constructed of concrete or

asphalt, and no inference to be drawn from the distance between two lines in a plan could relieve the plaintiff from the obligation to perform this express and explicit provision of the specification which he understood and upon which defendant's obligation was predicated."

So, in

Tharsis v. McElroy, L. R., 3 App. Cas. 1040
(House of Lords),

it was held that where contractors agreed to construct an iron building according to specifications and found that the girders could not be built in that way, and made them heavier, they were not entitled to recover for the difference as the fault of the specifications was no excuse.

Likewise in

Sharpe v. San Paulo R. Co., L. R., 8 Ch.
App. 597,

it was decided that where contractors had agreed to build a railway for a lump sum they must do so, notwithstanding the specifications and estimates were erroneous and the amount of the earth required to be removed was largely in excess of that shown by the specifications, for the reason, said the court, that they took this chance when there was no fraud or willful miscalculation.

To the same effect, see:

Leavitt v. Dover, 67 N. H. 94; 68 Am. St.
Rep. 640;

School Trustees v. Bennett, 27 N. J. L. 513;

Dermott v. Jones, 2 Wall. 1;
Scrivener v. Pask, L. R., 1 Com. Pl. Cas. 715;
Williams v. Fitzmaurice, 3 Hurlstone & Norman 843;
Hennessy v. Fleming Bros., 90 Pac. (Colorado) 77.

Section 4. Labor and Materials Within Scope of Contract as Construed by Parties.

As appears from the record in this case, when the contractors discovered the fact that the bedrock was not situated as delineated upon the drawings, after conversation with the superintendent in charge they were requested by him to continue excavation, and they complied with his request. It does not appear that any objection or intimation whatsoever was made that the construction work requested was not included within the terms of the contract. It also appears that the work in controversy here was done in the early stages of the contract, and that afterwards from time to time work outside the terms of the contract was performed, for which claims were presented and paid, and that the first payment under the contract was made after the work involved had been performed, but that no claim for this work was presented until after the bridge had been completed. These facts, we believe, show a practical construction of the contract by the parties which is binding on the court. If there can

be any doubt as to the correctness of our interpretation of the contract as above outlined, it is, we think, resolved in our favor by the conduct of the parties during the performance of the contract. As authority for this position we desire to quote

Wait on Engineering and Architectural Jurisprudence, Section 566 (p. 488),

as follows:

“When a structure is being built for a fixed price, recovery cannot be had for extra work merely by proving that the work was done at the owner’s request, and that it was accepted when finished; such a request has been held to be merely a notice that the contract called for the work. * * * If a contractor has undertaken to erect a structure according to plans, and agrees afterwards to changes, but makes no arrangements as to a new or different price, his recovery will be confined to the original contract price.”

To the same effect is

Thorn v. Mayor etc. of London, L. R., 9
Exch. 163, 175,

where it is said:

“I have great doubts whether this alteration which actually took place comes within the powers of variation contained in the contract. But the contractor did not raise this objection, but, as found by the case proceeded with the works in the new mode specified by the engineer. He seems to me to have sanctioned the work of the engineer in making the alteration, and it is now too late for him to say that it is a matter dehors the contract, and to require an

indemnity for the extra expense he has been put to.”

Likewise, see, also:

Wait, Eng. & Archi. Jurisprudence, Sections 578, 579, 580, and cases there cited;

Simpson v. United States, 172 U. S., at p. 383.

Section 5. Contract Construed Favorably to County.

In determining the true construction of this contract it should also be borne in mind that one of the parties thereto is a county, and that under the express provisions of Section 1554 of the Civil Code of California, the contract is to be construed most strictly against the private party.

Section 6. No Cause of Action for Warranty.

If, as we believe, the labor and materials sued for were within the terms and scope of the contract in suit, plaintiff's action here, if any he have, must be on the ground of warranty or misrepresentation. We will therefore consider the case from this standpoint, to determine whether or not the representation complained of here constituted a warranty upon which plaintiff could rely and by which defendant would be bound.

It is a general principle of contract law that recitals by way of description do not constitute a warranty.

30 Am. & Eng. Ency., (2nd ed.) 148;

Randall v. Thornton, 68 Am. Dec. (Maine) 56.

This principle found specific application to building contracts in the case of

Hooper v. Welch, 8 N. W. (Minn.) 589,

where it was held, in a case dealing with a bridge contract, that the plans could not be treated as warranties of anything because "it was plaintiff's business to ascertain before executing the contract that it could be fulfilled according to the plans".

It is also held in

American Surety Co. v. San Antonio etc. Co.,
98 S. W. (Texas) 387:

"If there is no implied warranty by the architect to his principal that there are no such inherent defects in his plans * * * it would seem that no such warranty should be implied by the owner to one who, with the plans and specifications before him, with ample time to consider and determine what is to be done and can be done by them, obligates himself to do the work to completion."

To the same effect is

Thorn v. Mayor, L. R., 1 App. Cas. 120
(House of Lords),

where it is said:

"But it is argued on behalf of plaintiff that from the contract itself a warranty may be

implied on the part of the defendants, that there are several distinct clauses in which the defendants expressly state that they will not guarantee certain things, and that upon the maxim *Expressio unius est exclusio alterius*, there is an implied warranty in every case which is not expressly excluded. This is certainly a novel application, if not a total change of the purpose of the maxim, for the plaintiff's argument really is that *Exclusio unius est expressio alterius*, that the exclusion of a warranty as to certain parts of the contract is an admission of a warranty as to the other parts. There is no principle upon which such a rule could exist; and certainly nothing approaching to it has ever been established."

See, also:

Simpson v. United States, 172 U. S. 372;

Bancroft v. San Francisco Tool Co., 120 Cal. 228.

Section 7. Action Barred by Section 4075, Political Code of California.

By the terms of Section 4075 of the Political Code of California, it is provided:

"The board of supervisors must not hear or consider any claim * * * nor shall the board credit or allow any claim * * * unless the same * * * is presented and filed with the clerk of the board within a year after the last item of the account accrued."

This section has been construed by our Supreme Court to include claims of all kinds whatsoever which may be urged against a county: See:

Farmers' etc. v. Los Angeles, 151 Cal. 655;

Rhoda v. Alameda County, 52 Cal. 350;

Alden v. County of Alameda, 43 Cal. 270;

McCann v. Sierra County, 7 Cal. 121.

If the cause of action stated here be treated as upon a warranty, the cause accrued when the contract was executed.

Jewitt v. Fisher et al., 58 Pac. (Kansas App.) 1023;

Bellamy v. Chambers, 69 N. W. (Nebraska) 770;

Merchants etc. Bank v. Spates, 56 Am. St. Rep. (W. Va.) 828;

Raynor v. Mintzer, 72 Cal. 585.

The contract was executed on the 8th day of September, 1908, more than a year prior to February 4, 1910, the date of making and presenting the claim here sued on. The mistake or alleged breach of warranty was actually discovered by the parties on October 25, 1908, and all damages sustained by the supposed breach had accrued on the 22nd day of December, 1908, when the construction below the point shown on the plans had been completed—all more than a year prior to the making and presenting of the claim sued on.

Section 8. No Claim for Breach of Warranty Presented to the County.

As appears from the authorities cited in the preceding section, no action can be maintained against a county unless the claim therefor has been presented to the Board of Supervisors and refused. An inspection of the record in this case reveals the fact that the claim presented and refused was one for extra work and labor, and not for damages for breach of a warranty. To the point that the cause of action sued on must be the identical cause presented to the Board of Supervisors, and that a variance in this respect is fatal, see:

Lichtenberg v. McGlynn, 105 Cal. 45;

Porter v. Fillebrown, 119 Cal. 235, at p. 238;

Brooks v. Lawson, 136 Cal. 10;

Dutard, Estate of, 147 Cal. 253.

It therefore follows that even if the facts would support a cause of action for breach of warranty in the first instance, this action cannot be maintained on the theory of warranty on account of the failure to present a claim of that nature to the county.

Section 9. No Action for Fraud, Misrepresentation or Tort Can be Maintained Against Defendant County.

It is well settled law in this jurisdiction that no cause of action for fraud or deceit, misrepresenta-

tion or other tort, can be maintained against a county, for the reason that a county is a mere subdivision of the state itself and cannot be sued unless permission to do so be given by legislative enactment, and on this point a county is to be distinguished from a municipal corporation or other public body voluntarily organized.

Sels v. Greene et al., 81 Fed. (C. C. N. D. Cal.) 555, and California cases there cited.

The same objections may also be made to the tort theory of the case, on the ground of bar by limitation and failure to present claim to the Board of Supervisors, as are made in Sections 7 and 8, *supra*, to an action for breach of warranty.

The foregoing argument and authorities concludes our discussion of the case upon the theory that the labor and materials sued for were covered by the terms of the contract. We have yet to determine whether or not the facts shown by the record are sufficient to entitle plaintiff in error to recover on the assumption that he was not compelled by the contract to perform the construction work in question.

Section 10. Implied Contract Cannot be Raised Against a County for Bridge Construction.

The theory upon which plaintiff seeks to raise an implied contract in this case for extra work and labor is, briefly stated, that the construction work

under discussion was not included within the scope of the contract; that the performance of such work was requested by the superintendent in charge and the Board of Supervisors at the time the work was done, and that the bridge was afterwards accepted and used by the county. That such a contract cannot be raised by implication is made plain by the terms of Section 4073 of the California Political Code, which reads as follows:

“Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge, or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified, in writing, and the cost thereof agreed upon between the board and the contractor. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure.”

This section speaks for itself, but out of extreme caution we desire to cite, in addition thereto, Sections 2713, 4005 and 4072 of the California Political Code, as lending further strength to the plain provisions of the section quoted.

In connection with this feature of the case, we desire to cite the following authorities as conclusive

of the proposition that no contract can be implied contrary to the express provisions of the statute:

Richardson v. County of Grant, 27 Fed. (Circuit Court, Dist. Indiana) 495;

Zottman v. San Francisco, 20 Cal. 96;

Schmeltzer v. Miller, 125 Cal. 41;

Addis v. Pittsburg, 85 Pa. St. 379;

Murphy v. City of Albina, 29 Pac. (Oregon) 353;

O'Brien v. Mayor, 139 N. Y. 542 (592, 594).

Section 11. Neither Request Nor Acceptance of Benefits Sufficient to Bind County.

Neither the request of the County Surveyor, acting as superintendent of construction in this case, nor the consent of Supervisors permitting such construction, can constitute the basis of a valid contract against the county, for the reason that such officers were not clothed with the authority to make such a request or to give such consent.

Addis v. Pittsburg, 85 Pa. St. 379;

Murphy v. City of Albina, 29 Pac. (Oregon) 353.

It has also been frequently held that the use of a structure by a county or other municipality, in the absence of a valid request does not constitute

such an acceptance of benefits as will raise an implied contract.

Zottman v. San Francisco, 20 Cal. 96, 107;

U. S. v. Pacific R. R., 120 U. S. 227, 240;

Davis v. School District, 24 Maine 349-50;

Moyle v. Congregational Society, 50 Pac.

(Utah) 806-9;

Murphy v. City of Albina, 29 Pac. (Oregon) 353.

Section 12. Claim on Implied Contract Barred by Limitation.

Even if there could have arisen in this case an implied contract for the construction work in question, such claim was barred by Section 4075, California Political Code, before presentation to the Board of Supervisors. The cause of action on implied contract arose, if at all, when the County Surveyor requested the work to be performed and the Supervisors gave their consent to its performance and pursuant to such request and consent the contractors completed such performance. All these acts occurred and were finished not later than December 22, 1908. The claim sued on was not presented until February 4, 1910, after the time limited by Section 4075 of the Political Code had expired.

We therefore conclude that upon the reasoning and authority herein set forth, the judgment of the lower court should be sustained.

Respectfully submitted.

J. C. CAMPBELL,

WALTER SHELTON,

Attorneys for Defendant in Error.

**ADDITIONAL BRIEF FOR DEFENDANT IN
ERROR BY ROWAN HARDIN, DISTRICT
ATTORNEY OF THE COUNTY
OF TUOLUMNE.**

Counsel for plaintiffs in their brief lay great stress upon that provision of the contract reading as follows:

“It is assumed that the bed rock on either side
“ of the river will be found at a depth shown on
“ plans”, without reference whatever to the middle
pier and argue that as no reference was made to
the middle pier in that statement, that it was a
warranty or express representation by the county
that bed rock was exactly as shown on the plans
and would be found at no greater depth.

Plaintiffs were on the ground prior to entering into the contract and were well acquainted with the surrounding conditions and nature of the country where the bridge was to be erected, and the evidence shows that the bed rock could be seen or could be ascertained on the sides of the river, but that it could not be seen and could not be determined for a fact without actual excavation in the center of the river and this plaintiffs well knew had not been done.

Consequently where the specifications would only assume that bed rock could be found on the sides of the river, it would appear strange that said specifications would or could be construed to warrant or represent as a fact that bed rock could be

found at a point in the middle of the river where actual excavation alone could determine where the bed rock was.

There could be no logical conclusion from such a statement in the specifications other than a warning to the contractor that said specifications did not assume that bed rock could be found in the center of the river as represented on the plans, and that the contractor must accept at his own peril the erection of the piers of that bridge.

It does not seem within common reason that a county would only assume something as a fact which could be easily determined and at the same time and in the same instant warrant something as a fact which could not be readily or easily ascertained.

The interpretation placed upon that portion of the specifications by counsel for plaintiffs is both improbable and unreasonable.

A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties.

C. C., Sec. 1643.

When we look into the intent and object of the contract in this action there is nothing uncertain or complicated about it. The intent and object is to erect said bridge, the abutments and wing walls of which to be thoroughly imbedded in the rock for a sum of \$16,775.00 and the contract to do this is

lawful, operative, definite, reasonable, and capable of being carried into effect without violating the intention of the parties.

To interpret the contract in the manner ^{as interpreted} by counsel for plaintiffs would have the effect of making a definite and reasonable contract, indefinite and unreasonable, for such an interpretation would lead to construing the terms of the contract in one instance to the effect that the contractor was compelled to go to bed rock wherever found, and in the other instance that he would not have to go deeper for bed rock ~~at~~ ^{as} the center pier than the point shown upon the plans, which construction or interpretation would leave the contract indefinite and in such condition that it would not be carried into effect, for if the contractors were not compelled by the contract to go deeper at the center pier than the point shown upon the plans, they could have stopped at that point and the intent and object of the contract would have been defeated.

Particular clauses of the contract are subordinate to its general intent.

C. C., Sec. 650.

Consequently in construing the wording of the specifications relied upon by the counsel for plaintiffs the wording of that clause is explained and governed by the general intent of the contract, which is the erection of a bridge the piers of which are imbedded in bed rock for said sum of \$16,775.00.

The evidence shows that the plaintiffs did a great deal of extra work on the bridge which was understood by all parties at the time it was done that it was extra work and as such extra work was completed, plaintiffs promptly put their bills into the county from time to time and were paid therefor.

No claim whatever was made to the county or its representatives at the time it was discovered that bed rock was not as shown in the plans, that the expense of going deeper than the plans showed was not within the contract and was not included in the price mentioned in the contract. All work on this pier upon which this action was commenced was completed in December, 1908, and no claim was presented to the Board for such work until February 4, 1910.

When the meaning of the language of a contract is doubtful the acts of the parties done under it affords one of the most reliable clues to the intentions of the parties.

Hill v. McKay, 94 Cal. 5.

Counsel for plaintiffs in their brief make plain the rules of law that a contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting and that a contract may be explained by referring to the circumstances under which it was made.

When we take the rules of law cited by counsel for plaintiffs together with the rule of law men-

tioned in the case of *Hill v. McKay*, above cited, and apply these rules to the facts established, we will see that prior to entering into the contract, the plaintiffs as such contractors go upon the ground and inspect all the conditions surrounding the erection of the Melones bridge and enter into a contract for construction of said bridge for a specified price without requiring or asking that they be relieved of cost in the event bed rock was not found at the point shown on the plans; after the construction of the bridge is commenced, they discover that bed rock was deeper at the center pier than shown on the plans and plaintiffs make no contention at that time that in going deeper to bed rock than the plans show would be outside of the contract, or that they would be entitled to extra compensation therefor. During the construction of the bridge various items of extra work are done for which plaintiffs promptly present their bill and receive their pay, and it is not until the bridge was finally completed and not until more than a year after the work was done that plaintiffs conceived the idea to present a claim for such extra work.

Consequently it is impossible to escape from the conclusion that plaintiffs understood at the time the contract was entered into and at the time the work was done upon the center pier that such work was part of the contract, included within the contract price and that they had no claim whatever for such work against the county.

If the intention of the parties had been otherwise, the claim for such extra work would have been presented immediately after the work was done, as the plaintiffs did with other claims they had for extra work.

The case of *McConnell v. Corona City Water Company*, 149 Cal., cited and relied upon by counsel, is clearly distinguishable from the present case, for in that case stress is laid upon the fact that the company in charge had to furnish the material for timbering a tunnel and furnished an inferior quality of timber for the construction and compelled the contractor to use such timber although the contractor objected to such timber.

In view of such a statement of facts, it can be readily seen that the contractor could not be held responsible for injury which was caused by defective material furnished to him by the company.

In the present cause no such question arises.

The evidence shows that all of the work for which this action was brought was fully completed on December 22, 1908 (Trans. p. 99).

The claim upon which this action was brought was not presented to the Board of Supervisors of the County of Tuolumne until the fourth day of February, 1910.

The Board of Supervisors are absolutely prohibited from hearing or considering any claim which is not presented and filed with the clerk of

the Board within a year after the last item of the ~~account~~ ^{account} or claim accrued.

Pol. Code, Sec. 4075.

It will be observed that the bill presented by Jorgensen Bros. to the County of Tuolumne (Trans. pp. 77-78) plaintiffs ask for one year's interest on the claim from February 1, 1909, to February 1, 1910, showing from plaintiff's said claim that the last item of their claim accrued more than one year prior to the time said claim was presented and that under said Section ~~1015~~ ⁴⁰⁷⁵, Pol. Code, the Board of Supervisors are absolutely prohibited from considering the claim and that plaintiff's action thereon must necessarily fall.

The counsel in their brief practically admit the correctness of the rule in the case of *Hennessy v. Fleming Bros.* that the hazard of an undertaking is assumed by the contractor and that he can not recover for increased cost as extra work on discovering that he has made a mistake in his estimate of cost. They attempt to distinguish the present case from that rule by a claim that the representation as to bedrock was a fraudulent representation and that the law relative to recovering money furnished upon that fraudulent representation would apply.

Such a claim however can not well be made in view of the fact that the evidence clearly shows that the plaintiffs viewed and inspected the ground prior to entering into the contract and were familiar

with all conditions surrounding the erection of a bridge at the point designated in the plans.

It is a well settled principle of law that if the means and knowledge be at hand and equally available to both parties and they have in fact made an investigation they can not recover upon the grounds of a misrepresentation of fact.

Chamion v. Woods, 79 Cal. 17, 20;

Lee v. McClelland, 120 Cal. 147;

Oppenheimer v. Clunie, 142 Cal. 313;

Southern Development Co. v. Silva, 125 U. S. 247;

Chryster v. Canaday, 90 N. Y. 272, 279;

Pomeroy Eq. Juris. (2nd Ed.), Sec. 892.

A contractor assumes the hazard of placing the building on a proper foundation regardless of what the plans might show.

Connors v. U. S., 130 F. 609;

Geary v. City of New Haven, 55 A. 584;

Harrison Granite Co. v. Stevens, 125 N. W. 36;

Pol. Code, Sec. 4073.

A contractor can not recover for extra work caused by defect in the plans.

Leavitt v. Dover, 32 Atl. 156.

Where the contract was to build a sewer and to do all necessary excavation, held, that the fact that part of the excavation was through rock, did not

entitle plaintiffs to extra compensation though neither party contemplated that rock would be met.

McCauley v. City of Des Moines, 48 N. W. 1028;

Simon v. Launis, 99 Ky. Law Rep. 59.

Under a contract for excavation plaintiffs can not recover extra compensation for excavating to greater depth than they expected to, where the contract silent as to depth is for a certain price per cubic yard, and no notice was given that it would be increased on account of the greater depth.

Ambler v. Phillips, 19 Atl. 71;

Wilkin v. Ellensburgh Water Co., 24 Pacific 460.

(Where it is impossible to determine what are the rights of the parties to building contract, or whether work performed by the contractor came within or was in excess of the obligation of his contract, the presumption of law is that it was required by the contract.)

Crocker v. U. S., 21 Ct. Cl. 255.

Where a contractor fails to make any objection to any extra work or fails to include it in his monthly estimate of work and knowing at the time that such expense was incurred, he is estopped from afterward making such claim.

Winston Bros. v. Louisiana Cent. Co., 53 So. 367;

Rebekah Assembly I. O. O. F. v. Pulse, 92 N. E. 1045.

Where uncertainty exists in a contract between a public body and a private person, the uncertainty is presumed to have been caused by the private party.

C. C., Sec. 1654.

Existing law enters into and becomes a part of the contract.

Pignaz v. Burnett, 119 Cal. 160.

The plans and specifications and contract were never placed on record, by plaintiffs, which act renders the contract void.

Holland v. Wilson, 76 Cal. 434;

Burnett v. Glas, 154 Cal. 255;

Condon v. Donohue, 160 Cal. 749;

C. C. P., Sec. 1183.

Respectfully submitted,

ROWAN HARDIN,

District Attorney of the County of Tuolumne,

Attorney for Defendant in Error.

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In the United States
Circuit Court of Appeals

For the Ninth Circuit

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal
Corporation of the State of California,
Defendant in Error.

No. 2121

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

THE CONSTRUCTION PUT UPON THE CONTRACT BY DEFENDANT IN ERROR IS UNREASONABLE, AND UNFAIR TO PLAINTIFF, AND UTTERLY IGNORES SEVERAL ESSENTIAL STIPULATIONS OF THE CONTRACT.

The contract called not alone for the construction of a bridge for the price stipulated. It called for the construction of a bridge "of the dimensions shown on the plans." (Transcript pp. 67, 62 and 63.)

The construction of the contract for which defendant in error contends entirely ignores and

eliminates from the contract that provision of the contract, as well as the express representation in the plans relating to the dimensions of the center pier and the distance to bedrock at its base.

Under this construction the contract becomes unilateral throughout. Under it the contractors would have been bound to construct a bridge of any size, whatsoever. If the dimensions on the plans were not binding upon the defendant in respect to the dimensions of the midstream pier, they were not binding upon it in respect to the dimensions of any other part of the bridge shown on the plans.

Indeed, defendant in error argues that the scale of the drawings was descriptive only: (1) in connection with the piers on each side of the river and the depth to bedrock to be reached there; (2) in connection with the foundations and footings of all piers; and (3) in connection with the midstream pier and the depth to bedrock at its base. Now, bearing in mind that the depth to bedrock determines the height of the piers, and their height determines the other dimensions of the piers and to some extent of the entire bridge, in proportion, and that the excavation work, the foundations, and the piers are the principal and most expensive part of the whole work, it may be pertinent to ask what, if anything, was made certain or conclusive by the contract under the defendant's construction of it except the amount fixed by the contract at \$16,775.00 as the price to be paid to the contractors?

The question is what was there in the contract, in the surrounding circumstances, in the situation

of the parties, in law or in reason to demand such a construction?

Defendant insists that the plaintiff's assignors should have inquired whether soundings had been made to ascertain the location and depth to bedrock in midstream, but it is more reasonable to contend that the location and depth to bedrock, and the dimensions of the pier, in midstream were concluded by the express showing and representations in that regard made in the plans and by the language of the specifications calling for a bridge of the dimensions shown on the plans in as much as nothing transpired between the parties to raise any question as to truth of the representations.

The pleadings admit that these plans and specifications were proposed and furnished by defendant to the contractors for the purpose of preparing and making their bids. (Paragraph VI of Complaint, and paragraph III of 2nd Amended Answer, Transcript, pp. 8, 31.)

"We are not authorized to assume the furnishing of these plans and specifications, and inviting of bids, were intended either to entrap the unwary, or as an idle and useless ceremony. But we must assume that they were intended in good faith for the purpose of intelligently and bona fide making a contract for the construction of the court house."

Cook Co. vs. Harms, 108 Ill. 158,

Smith vs. Salt Lake, 83 Fed. 786, 787-8.

It is apparent that the defendant county was desirous of obtaining an entire bid for the whole

work, and as low a bid as possible. For that purpose it had selected the exact site for the proposed bridge, had placed the piers and abutments, and caused to be prepared plans and specifications giving the distances and dimensions of every single part, and defining the quantity, quality, extent, nature, and character of the proposed work down to the minutest detail. The manifest purpose of all this was to make certain, definite, and specific the work to be let, so that the defendant might have the advantage of intelligent and reasonable estimates and of selecting the lowest bidder.

It must be assumed that the defendant was willing to pay a fair price for what it wanted and got, and sought to make a fair contract.

Again the defendant merely required the contractors "to view the proposed work" and judge of its nature and character. They were not asked by defendant to satisfy themselves of the conditions under water. They went upon the ground and viewed the proposed work, and the appearances there were such as to lead them to believe that the plans were drawn substantially according to the fact. And the specifications did not ask them to assume the risk of going to a greater depth to bedrock in midstream, as they were required to do on the sides of the river. Because of these facts, the plaintiff testifies in substance, he concluded that the surveyor and draftsman who made the plans had actual knowledge of some kind as to the location of bedrock in the river. (Transcript, pp. 85-86.)

Those were the appearances, the situation of the parties, and the surrounding circumstances.

Plaintiff in error has shown that his assignors had a right to rely upon the express representations made in the plans regarding the depth to bedrock in midstream.

Langley v. Rouss, 82 N. Y. Supp. 1082, 1085,
Wyandotte etc. v. King Bridge Co., 100
Fed. 204,

Delafield v. Westfield, 28 N. Y. Supp. 443,
Horgan v. Mayor, 55 N. E. 205,

and other cases cited in the opening brief, p. 21.

“The plaintiff was entitled to rely on the representation quoted as to depth of the foundations on north property, and to regard any work as extra which might be rendered necessary by reason of the fact that the representation was incorrect.”

Langley v. Rouss, 82 N. Y. Supp. 1085.

The representations here were a “warranty” as to the depth to bedrock in midstream.

Delafield v. Westfield, 28 N. Y. Supp. 443,
and generally the other cases cited in this and the opening brief.

Defendant in error argues in this connection that it would be strange for the county to insert the provision with reference to the bedrock on each side of the river (where it can be readily located), and omit such a provision as to bedrock in the middle of the river, unless the county contemplated that the other requirement in respect to the imbedding of the piers in bedrock was of controlling force, as contended herein by defendant in error.

Such a deduction or reasoning is neither logical nor convincing. Its fallacy lies in the fact that it is not a necessary, nor even a reasonable deduction, and that this line of argument is begging the very question. It would have been easy for the defendant to provide in the specifications that if bedrock at the midstream pier was not found at the depth shown on the plans the contractor would have to go to whatever depth might be required, without additional compensation. Such was the case in *Stuart v. Cambridge*, 125 Mass. 102, cited by defendant in error. And the fact that no such provision was made does not argue in favor of the contention of defendant in error. On the contrary. The defendant in error in this argument, assumes that the contractors were bound by reason of the provisions to go to bedrock in midstream at any depth, and then seeks to prove this assumption by itself. This argument, stated briefly, is simply this: It would have been strange if defendant in error had not meant to thus bind the contractors, and therefore the contractors were thus bound, by reason of said provision. A clear case of reasoning in a circle.

The provision against extra compensation in connection with the work on each side of the river really did not mean much to the parties. The bedrock there was considerably exposed to view (transcript, pp. 87-88), and subject to slight irregularities on the bottom could be figured on beforehand for all practical purposes. The plans there were substantially correct (Transcript, p. 88). To make such a provision for that particular work was practical

and economical in the end. And it was entirely in line with the manifest purpose of the defendant in error at the time to make the work to be let certain, definite, and specific, so that defendant might have the advantage of competitive bidding and of the lowest bid.

But that the defendant county would want to make the same kind of a contract in connection with the work on the pier in midstream, where, as it appeared later, the depth to bedrock was not known, is not at all probable, nor would it have been in line with its manifest purpose of certainty and economy. On the contrary, it would have been highly speculative, and might have entailed a waste of public funds. Because it might have resulted in a gain in this particular case is beside the point. IF THE PLANS AND SPECIFICATIONS HAD STATED THAT THE DEPTH TO BEDROCK THERE WAS UNKNOWN, and that the contractor would have to assume the risk, THE RESULT WOULD HAVE BEEN THAT ALL BIDS WOULD HAVE BEEN HIGHER. Every bidder would naturally seek to protect himself against loss in case bedrock should be at a lower depth. Supposing then that the defendant in error was satisfied, from the appearances upon the ground, that bedrock in the middle of the river would be found at the depth where it was shown on the plans, and was willing to take the risk which it now claims the contractors assumed, for the purpose of obtaining the lowest bid possible. Would that be so strange a thing for defendant to do? Or, supposing that the defendant in error could not tell anything about it, as it

alleges in its answer (page 31 of Transcript, folio 43); but was willing to definitely fix the depth of bedrock in the river as shown in the plans as a basis for a reasonable bid and a fair contract, rather than to submit to high and arbitrary estimates and bids which it would otherwise surely have to contend with. Would that be so strange for it to do? Or even, supposing that the county surveyor who prepared the plans and specifications was deceived by the appearances upon the ground, as was the plaintiff when he viewed the proposed work before making a bid, and was thereby induced to positively represent and indicate on the plans that bedrock at the midstream pier was at the depth of $27\frac{1}{2}$ feet from the springline of the arch. He knew that such a representation was essential to an intelligent and fair estimate and bid. Would that be so strange?

What may seem strange to the defendant in error now, appears to be a very reasonable thing, if looked at in another light. One must look at the provisions in question from these different points of view, all of which could have readily suggested themselves to prospective bidders at the time.

It would, therefore, not only be NOT strange that the county should not have wanted to speculate or gamble on the depth to bedrock at the midstream pier, but it would have been a most reasonable thing to assume that the defendant deliberately made the conventional depth of $27\frac{1}{2}$ feet, represented on the plans as a positive fact, the basis for the bids and for the contract.

And, hence, the absence from the specifications of a provision that the depth to bedrock at the mid-stream pier also was assumed, and that the contractor must take the risk there the same as on each side of the river, fails to argue in favor of the construction now placed on the contract by defendant in error. The absence of such language actually throws light and shows that the contract did NOT mean what it did NOT state, which is as it should be.

Now, when one looks back, one is apt to be blinded by the outcome to the actual conditions and the situation of the parties at that time. We now know that the plans were erroneous, and that bedrock in midstream was not reached except many feet below the depth shown on the plans. But the contractors did not know this when they were making their estimates. And, after all, the question in the case is not whether it was strange for the defendant to make such a contract, but did it in fact make it? And that depends to a large extent upon what the contractors had a right to rely upon.

We respectfully insist that the defendant in error is bound by its own language.

Section 1656 of the Civil Code of this State, relating to the rules of interpretation of contracts, provides:

“All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, *unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.*”

And section 1580 of the Civil Code provides:

“Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases, defined by the chapter on interpretation, they are to be deemed so to agree without regard to the fact.”

Now, the defendant saw fit to expressly mention the bedrock on each side of the river, and to provide in connection with it that the contractor must go to a greater depth than that shown on the plans without additional expense to either county, if necessary. And it excluded the midstream bedrock and pier from this provision. By force of the provisions of section 1656 C. C., above quoted, all work of the same class, in connection with the center pier and bedrock in the middle of the river, must therefore be deemed to be excluded.

The cases cited by defendant in error on pages 9-12 of its brief are all cases which in principle are linked with the case of *Lentilohn v. New York*, 92 N. Y. Supp. 902, which defendant in error failed to cite but which states the distinguishing principle upon which we rely in this connection most clearly, as follows:

“In those cases, and only those, I think, where there is an express representation in a plan or specifications inserted for the purpose of showing that something exists which will facilitate or render less expensive the performance of the work, a recovery may be had. (Citing) *Langley v. Rauss*, 82 N. Y. Supp. 1082; *Horgan v. Mayor*, 55 N. E. 204; *Becker v. New York*, 63 N. E. 301).”

All of the cases cited by defendant in error are to be distinguished from the case at bar upon the facts and on principle.

In *Stuart v. Cambridge*, 125 Mass. 102, the specifications contained this provision: "All basement walls will commence fourteen inches at least below the basement floor, *and as much deeper as necessary to guarantee a firm and solid foundation.*" This was a provision which clearly told the prospective bidder that the conditions underground were unknown and gave him fair warning. And it was upon this provision that the decision of the court was based.

In *Wear Bros. v. Schmaltzer*, 92 Mo. App. 321, the specifications provided: "All foundations to go down to the natural and undisturbed earth *and to extend deeper than shown on the drawings, if necessary to reach firm and solid foundation.*"

Early v. O'Brien, 64 N. Y. Supp. 848, itself in the opinion distinguishes that case from *McKnight Mfc. Co. v. New York*, 54 N. E. 661, upon which we rely to illustrate the principle here contented for by plaintiff in error. The facts in that case, as well as all the other cases cited on this point by defendant in error were such as to bring them clearly within the general rule which is, as stated in *Hennessy v. Fleming Bros.*, 90 Pac. 78, that the hazards of the undertaking are assumed by the contractor, and he cannot recover for increased cost, as extra work, upon discovering that he has made a mistake in his estimate, or that the work is more difficult or expensive than he anticipated.

Here, however, there was an express representation in the plans that bedrock in midstream was at a certain depth which was positively and definitely

shown. And this fact excepts the case from the operation of that rule.

II.

THE PLAINTIFF'S ASSIGNORS DID NOT WAIVE THIS CLAIM TO COMPENSATION OR DAMAGES BY CONTINUING WITH THEIR WORK WHEN THE ERROR ON THE PLANS WAS DISCOVERED.

Defendant in error claims that because the plaintiff's assignors did not make any claim for additional compensation or a new contract at the time when it was discovered that bedrock in midstream was not at the depth shown on the plans, they waived their claim to such compensation.

THIS PROPOSITION ASSUMES ERRONEOUSLY THAT THE PLAINTIFF IS SEEKING TO RECOVER EXTRA COMPENSATION UNDER THE CONTRACT.

The work in suit was new and additional work without which the bridge could not be completed in a safe condition (Transcript, p. 94). It was made necessary by unexpected physical conditions which had been erroneously indicated upon the plans. This action is to recover damages by reason thereof, on the theory of a constructive contract.

Hertzog v. Hertzog, 29 Pa. St. 468.

It was said in a case resembling the case at bar very closely in principle:

"It is insisted on behalf of the city that the plaintiff, by obeying the orders of the engineers of construction, requiring him to take up and relay the alleged improper work, without making any claim for extra compensation at the time the changes were ordered or made, or with-

out making a new contract, has waived any claim, if he was entitled to any, to extra compensation. This proposition assumes erroneously that the plaintiff is seeking to recover extra compensation under the contract. This action is to recover damages for breach of the contract.”

Gearty v. New York, 63 N. E. 807.

“The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that where one party to a contract breaks the same the other party may stop and refuse further performance. But, instead of doing so, he may perform as far as he is permitted and then claim the damages he suffers from the breach.”

McMaster v. State, 15 N. E. Rep. 421-422.

“If there was a waiver on the part of the plaintiff, it must be made to appear in some way, and will not be presumed from the mere fact that he continued his work under his original contract after the unauthorized action of the board of public works in modifying and changing the same.”

Markey v. Milwaukee, 45 N. W. 28, 30.

O'Neill v. Milwaukee, 98 N. W. 963, 966.

The admission in the pleadings in the case at bar is in substance that this work was “required” of the contractors by the defendant’s agent under a claim that it was work within the terms of the contract. (Paragraph X of complaint, transcript pp. 14 and 15; and paragraph VII of amended answer, transcript pp. 53-54). The evidence also shows that there was a conversation about it between one of

the contractors and Mr. Pickle, said agent, in which the latter claimed that the contractors were bound to do this work under the contract. While it does not expressly appear what the contractor said during this conversation, it is perfectly clear that he complained about the error in the plans. (Transcript, p. 93.) He could not do more at the time. Either they would have to stop work, and sue for damages, or else complete the bridge as best they could, and then sue for damages. But they were not required to prefer a claim for extra compensation at the time, or to make a new contract.

Gearty v. Mayor, *supra*.

The New York Court of Appeals in this same case states the rule clearly, as follows:

“It has been said that ‘the doctrine of estoppel lies at the foundation of the law as to waiver.’ Underwood v. Insurance Co., 57 N. Y. 505. In Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822, the doctrine of an equitable estoppel is discussed; and it is held, that to constitute it, ‘the person sought to be estopped must do some act or make some admission with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim that he proposes now to make. The other party must have acted upon the strength of such admission or conduct. In cases of silence there must be not only the right, but the duty, to speak, before a failure to do so can estop the owner.’ Page 316, 107 N. Y., and page 271, 14 N. E., 1 Am. St. Rep. 822. In Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548, Earl C. J., at page 447, 42 N. Y., 1 Am. Rep. 548, uses this language: ‘Now, what is an equitable estoppel in pais, as generally understood and applied in

the courts? It is used to preclude a party from maintaining by evidence that which he has before expressly or tacitly denied, or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive.' See authorities there cited; also *Boerum v. Schenck*, 41 N. Y. 182."

Gearty v. Mayor, etc., of City of New York,
63 N. E. Rep. 807.

Here it appears that both parties probably were taken by surprise. It came at a time when a big part of the bridge had already been constructed, and there was no other way out of it except to do this work in order to complete the bridge. It could not be prevented then without losing the work already done (Transcript, pp. 93 and 94). The necessity for this additional work was an irrevocably accomplished fact or condition when it became apparent for the first time. The contractors were in a helpless situation. They either had to do this work, or place themselves into the position of defaulters under a contract with the county. This clearly is not a case wherein the doctrine of waiver can be applied.

In the case of *Simpson v. United States*, 172 U. S., cited by defendant in error, it seems that the change there made was authorized by the contract. The specifications prescribed two plans of constructing the work there in question, and the contractor had already proceeded under one of them, when the appearance of quicksand made it advisable to follow the other plan, and he was directed to do the work

over again. He did so, without any complaint, and asked for and was granted extensions of time, and finally upon completion and acceptance of the work he accepted payment under the contract, gave a receipt in full and made no claim or demand for extra compensation. Three years later an assignor of the contractor brought the action for extra compensation, and this was the first intimation to the government that the contractor claimed to have done extra work. (See page 378 of the report.) Clearly, that case is not a parallel case.

Again this defense was neither pleaded by the defendant, nor urged in the court below. It was not one of the grounds of the motion for non-suit. (Transcript, pp. 99-100.)

The plaintiff's assignors presented a claim for the work in controversy at the same time that they presented their claim for the balance due them under the contract, immediately upon the final completion of the bridge, and this action was commenced in March, 1910, or within a month after the completion of the bridge. (Transcript, pp. 97-98.)

III.

THE CAUSE OF ACTION ALLEGED IN THE COMPLAINT AND PROVED AT THE TRIAL DOES NOT INVOLVE A QUESTION OF THE SUITABLENESS OR SUFFICIENCY OF THE PLANS.

The second count of the complaint sets forth all the facts. It is not necessary to characterize the form of the action. It is alleged that the plans and specifications were furnished by defendant to the

contractors to make their estimates and bids and later to do the work by. That the plans positively and definitely fixed and indicated the depth and location of bedrock at the base of the midstream pier at 271½ feet below the spring line of the arch of the construction, and warranted and represented the same as a fact known to or ascertained by the maker of the plans, and so as to induce the belief, and that they did induce the belief, in plaintiff's assignors that the location and depth of bedrock at this place was known to defendant or its agents, and to be in fact as shown on the plans. It is further alleged that plaintiff's assignors made their estimates and bid, and entered into the contract solely under such belief and in reliance upon the representation and showing made in the plans, etc., etc. That the plans were erroneous in that regard, and negligently and carelessly made, drawn and filed, and in entire ignorance on the part of defendant or its county surveyor of the actual location of bedrock at said point; and that plaintiff's assignors at all times and until the error was actually discovered were in entire ignorance thereof. It is further alleged that bedrock at this point was not reached at the depth shown on the plans. That plaintiff's assignors were then required by defendant or its authorized agent to continue their excavations to bedrock, as required and prescribed by the specifications; that bedrock was not reached except at the additional depth of 251½ feet. That by reason of the facts, and the careless, wrongful, and negligent acts of defendant and its officers and agents,

the contractors were compelled to make these additional excavations and furnish additional work and material in the construction of the center pier, and put to great expense, and compelled to do this work at a largely increased cost by reason thereof; that said additional work, labor, and material was of the fair, reasonable, and necessary cost and expense to said contractors of more than \$7,956.63; whereby and by reason of the facts alleged said contractors were injured and damaged in the sum of \$7,956.63. (Transcript pp. 10-16.) The first count of the complaint alleges the same cause of action and is in the form of the common count.

The answer practically admits all these allegations, except so as to raise an issue upon the proper construction of the contract.

Clearly, this is not a case of "insufficient or improper" plans, such as were involved in the cases cited by defendant in error on pages 15 and 16 of its brief, which follow the well known rule that in such cases the contractor agreeing to construct a building and deliver it complete assumes the risk of the sufficiency of the plans, and that the owner is not a warrantor of their sufficiency.

On the contrary the case at bar proceeds upon the theory that the defendant in error was bound to furnish correct plans and that it negligently made express representations which were erroneous, or else that it is estopped from questioning the correctness of the plans.

See:

Wyandotte etc. Co. v. King Bridge Co., 100
Fed. 204,

Smith v. Salt Lake, 83 Fed. 787-8,
Dalafield v. Westfield, 28 N. Y. Supp. 440,
443,
Langley v. Rauss, 82 N. Y. Supp. 1082, 1085,
Sexton v. Chicago, 107 Ill. 324, 327, 332, 333,
Sexton v. Chicago, 2 N. E. 265,
O'Neill v. Milwaukee, 98 N. W. 963, 966.

IV.

AN ACTION IN TORT MAY BE MAINTAINED AGAINST A COUNTY.

In opening and constructing highways and bridges a county does not exercise powers relating to the administration of general laws. It is only in cases of the latter class, where the county is made the compulsory agent of the state, that a county cannot be sued in tort. This distinction is clearly pointed out in the case of Sels v. Goune et al., 81 Fed. 555, 559, the only case cited on this point by defendant in error. The opinion in that case refers to Colman v. San Mateo, 75 Fed. 520, where it was held that a county may be sued in tort committed in connection with the opening of a road.

It is well settled that if a county or a municipal corporation, like a natural person, by its own act causes work to be done by a contractor to be more expensive than otherwise it would have been according to the terms of the original contract, it is liable for the increased cost.

Chicago v. Duffy, 75 N. E. 912, 913,
Horgan v. New York, 55 N. E. 204,
Backer v. New York, 63 N. E. 298, 301,

Gearty v. Mayor, 63 N. E. 804,
O'Neill v. Milwaukee, 98 N. W. 965, 966,
Messenger v. Buffalo, 21 N. Y. 197,
Brady v. New York, 30 N. E. 757,
Mullholland v. Mayor, 113 N. Y. 631,
Wyandotte v. Bridge Co., 100 Fed. 197,
Burns v. Casey, 109 Pac. 94, 97, 100, 101,
St. Charles v. Stockey, 154 Fed. 772,
Smith v. Salt Lake, 83 Fed. 784,
Cook County v. Harms, 108 Ill. 158.

V.

THE OBLIGATION OR LIABILITY OF THE DEFENDANT COUNTY IS ONE WHICH THE LAW CASTS UPON IT.

Section 4073 of the Political Code of this State, relied upon by defendant in error (pp. 19-21 of its brief), does not apply to the case at bar.

The first part of that section deals with voluntary changes and alterations of contracts. Clearly, that part of the section does not fit this case.

The concluding paragraph of the section relates only to extra work or extra compensation for work within the terms of the contract.

The work in suit was new and additional work, and outside of the contract. It was additional work required by the wrong location of the midstream pier and bedrock, which were located by the engineers of the county. The obligation to pay for this work arises from the law.

Wyandotte etc. v. Bridge Co., 100 Fed. 203-204, 205-206,

Salt Lake v. Smith, 104 Fed. 466, 467,

Cook Co. v. Harms, 108 Ill. 158,
Langley v. Rauss, 82 N. Y. Supp. 1085,
Sexton v. Chicago, 107 Ill. 327,
Chicago etc. R. R. Co. v. Vosburgh, 45 Ill.
315,
Cunningham v. Baptist Church, 28 Atl. 490,
Chicago v. Sexton, 2 N. E. 265, 266-7,
Messenger v. Buffalo, 21 N. Y. 197,
Dwyer v. New York, 79 N. Y. Supp. 17,
Gearty v. New York, 63 N. E. 804, and cases
generally cited above,
15 Am. & Eng. Ency. Law, 2d Ed., page
1078,
Smith v. Maynihan, 44 Cal. 62,
Sections 1427, and sub. 2, 1428 C. C.,
Sections 25, and sub. 2, 26, C. C. P.

In any event, the work in question would be considered work necessary to save the contract, and outside of the limitations imposed by section 4073 of the Political Code.

Allen v. Rogers, 20 Mo. App. 290.

And the contract, if necessary, would be treated and read by the court as reformed by reason of a mistake.

McManus v. Philadelphia, 60 Atl. 1001.

In so far as section 4073, and sections 2713, 4005, and 4072 of the Political Code operate as a limitation upon the powers of the Board of Supervisors, they are entirely beside the case, this is an obligation which the law casts directly upon the county, independent of any contract. The contract in such case is a mere fiction of pleading and is a construc-

tive contract as distinguished from an implied contract. (Hertzog v. Hertzog, 29 Pa. St. 468.)

Moreover, the sections of the Political Code relied upon by defendant in error do not apply to bridges over streams dividing two counties. With respect to such bridges the powers of the Board of Supervisors are plenary, and it may determine in each particular case the mode, as well as the extent of the exercise of such powers.

Croley v. Cal. Pac. R. R. Co., 134 Cal. 561,
Sacramento Co. v. S. P. Co., 127 Cal. 221,
Pool v. Simmons, 134 Cal. 623,
People v. Craycroft, 111 Cal. 544.

All the cases cited on this point by defendant in error on pages 21 and 22 of their brief are instances of limited powers circumscribed in the extent as well as by the mode of their exercise. Counsel for defendant argued upon the oral argument that section 4073 Pol. C. was enacted after the decision in the Croley case, and that it neutralized that decision in so far as this case is concerned. But as to this he was in error. The County Government Act of 1897, p. 470, sec. 38, contained the same provisions which have since been embodied in section 4073 of the Political Code.

Again, the bridge was completed and ready for delivery about the 1st of February, 1910. Page 98. These facts were admitted to be true.

The bridge was accepted on the 1st of February. (Page 97.)

The claim was filed and presented to the Board of Supervisors on February 4th and rejected on

February 23rd. (Page 77. Resolutions pages 73, 74 and 75.)

It is clear that in this state a county can become liable on an implied contract.

In *San Francisco Gas Company vs. San Francisco*, 9 Cal. 453, Judge Field said: "Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases and the implication extends equally against corporations."

This is as well established by the authorities as any principle of law can be.

This doctrine is approved in the case of *Contra Costa Water Co. vs. Breed*, 139 Cal. 432-438, and the case of *Zottman vs. San Francisco*, 20 Cal. 96, relied upon by defendant in error, to sustain the proposition that an implied contract cannot be raised against a county, is distinguished. See page 438. It will be noticed that in the *Zottman* case, the Court held that the City Council had absolutely no authority to make the alleged contract on account of "restrictions imposed by the charter" upon their powers, and the test of whether or not an implied contract can be raised against a county just the same as against an individual would seem to be whether or not the act upon which the implied contract is based would be within the power of the

governing board under any conceivable circumstances, that is to say, if the Board under no circumstances could make the contract, then under no circumstances would it be implied; but if the contract was within the power of the board, and it is only a question of whether or not the Board properly exercised the power, then the contract can be implied, and after accepting the benefit of the expenditure justified by the act of the Board, the Board is then estopped to deny that it authorized the expenditure. This is clearly the result of the authorities. See *County of Sacramento vs. Southern Pacific Company*, 127 Cal. 217, and *Hitchcock vs. Galveston*, 96 U. S. 341. Also note to case of *Flowers vs. Logan County*, 137 Am. St. Rep. 347-354. This note collects the authorities, and it is apparent that the doctrine is founded upon the rule announced by the U. S. Supreme Court in the case cited in the opening of plaintiff in error, viz: *Zabriskie vs. Cleveland R. R. Co.*, 23 How. 381.

This doctrine of estoppel is clearly announced in the case of *Seymour vs. Oelrichs*, 156 Cal. 782, also cited in the opening.

VI.

THE PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY SECTION 4075 POL. C.

The plaintiff's assignors did present a claim for the work in suit immediately upon the completion and acceptance of the bridge. Until then they had no right to demand payment from the county. If they had abandoned their contract after doing all

or any portion of this additional work they could not have demanded payment from the county. Furthermore, their contract being entire, they could not demand payment under their contract until completion of the work. Clearly, they could not demand payment for this additional work until they were entitled to payment for the work within the contract. The county might never have accepted the bridge. Granting that all this additional work was very satisfactory, and that the liability of the county accrued upon its completion, yet the claim for the same would not become due and payable until the entire bridge was finished according to contract. Until then the obligation of the county to pay for this additional work was clearly contingent upon the final completion of the bridge according to contract.

See generally:

Am. Ins. Co. v. San Antonio etc. Co., 98 S. W.
400,

Chicago v. Sexton, 2 N. E. 264,

Cody v. City of New York, 75 N. Y. Supp.
648, 653.

It is respectfully submitted that this claim or demand did not "accrue" within the meaning of section 4075 Pol C. until final completion of the bridge according to contract.

The word "accrued" applied to a cause of action means to arrive, to commence, to come into existence, to become a present enforceable demand.

Eising vs. Andrews, 66 Conn. 53, 50 Am. St.
Rep. 75.

“Accrues” means the time at which an enforceable legal right arises so that a suit might be brought thereon.

Rice vs. U. S., 122 U. S. 611 (30 Law Ed. 793).

But section 4075 Pol. C. does not at all cover the case of an unliquidated claim or demand against the county arising in tort and created by the general law alike governing counties as well as natural persons. A mere reading of said section and the sections following it is sufficient to show that the language and provisions therein contained would be very inapt if applied to a claim or demand like this.

But it is well settled that such language as is found in section 4075 Pol. C. does not apply to claims or demands of this character, and that no claim need be presented therefor at all before bringing suit.

Adams v. Modesto, 131 Cal. 501,

Strangler v. San Francisco, 84 Cal. 12, 20,

Bloom v. San Francisco, 64 Cal. 503,

Farmers, etc., Co. v. Los Angeles, 151 Cal. 655, cited by defendant, is based upon a provision in the city charter providing that all demands of every kind against the city shall be presented, and that no action shall be commenced against the city in any case until after such presentation and rejection.

The peculiar wording of this charter is distinguished and pointed out in Trower v. San Francisco, 157 Cal. 767-768.

The other cases, McCann v. Sierra County, 7 Cal.

121, *Alden v. Alameda County*, 43 Cal. 270, and *Rhoda v. Alameda County*, 52 Cal. 350, also cited by defendant in error, were all decided under old statutes materially different from the provisions of section 4075 Pol. C., and which are no longer in force.

A similar construction has been placed upon the language of the constitution, which forbids counties to "incur any indebtedness or liability in any manner" exceeding in any year the income provided for such year. It is uniformly held that this provision does not apply to liabilities which the law casts upon counties, irrespective of any contract expressed or implied.

McCracken v. San Francisco, 16 Cal. 631;

Lewis v. Widber, 99 Cal. 412;

White v. Franklin Bank, 22 Pick. 184;

Beach v. Fulton Bank, 7 Caw. 485;

Cook v. Ansonia, 66 Coun. 423, 34 Atl. 183;

McAleer v. Angell, 19 R. I. 892;

Little v. Portland, 37 Pac. 911, 914;

Thomas v. Burlington, 28 N. D. 480;

People v. May, 12 Pac. 838, 841;

Gubner v. McClellan, 115 N. Y. Supp. 755.

VII.

THE CONTRACT WAS NOT VOID BECAUSE NOT RECORDED.

The work in suit although made necessary by the contract is entirely outside of its terms. The contractors have been paid for the work performed

under it and if the contract had been void it would be too late now to question its validity.

But if the provisions of section 1183 C. C. P., relating to the recordation of contracts under the mechanics' lien law, at all apply to contracts with counties, the contract was nevertheless not void, but valid and binding as between the parties.

Stimson v. Brown, 136 Cal. 122, 125;

Laidlaw v. Marie, 133 Cal. 175-176.

At the hearing the attorney for defendant in error complained that the advocate for plaintiff in error had attempted to color his argument by the statement that the county had received a \$24,000 bridge for \$16,000, dealing in round numbers. The Court will see that there was a fair justification for the statement by reading the testimony of the witness H. H. Will Jorgensen on cross-examination on page 97, where it appears that the claim for the extra work is based upon its actual cost.

It is respectfully submitted that the judgment of the lower court should be reversed.

F. J. SOLINSKY,

PAUL C. MORF,

FRANK R. WEHE.

Attorneys for Plaintiff in Error.

19

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Mu-
nicipal Corporation of the State of
California,

Defendant in Error.

No. 2121

PETITION FOR A REHEARING.

*To the United States Circuit Court of Appeals for the
Ninth Circuit, and to the Justices of said Court:*

The plaintiff in error respectfully asks for a re-
hearing of this cause by this Court:

In the opinion on file herein it is held that the
work in suit was extra and beyond the terms and
requirements of the contract. But it is further held
that section 4073 of the Political Code of this State
covers this case; that the board of supervisors would
not become liable to pay for said work except in the
manner prescribed in that section; and that said statute
is preclusive of the county's liability in the present
case.

We respectfully suggest and insist that said section 4073 does not cover this case and is not at all applicable, and we confidently believe that this court upon a reconsideration of the case will so hold.

Section 4073 reads as follows:

“Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge, or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified, in writing, and the cost thereof agreed upon between the board and the contractor. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure.”

I.

THE REASONABLE INTERPRETATION OF SAID SECTION 4073 IS THAT THE SECTION HAS REFERENCE ONLY TO BRIDGES SITUATED ENTIRELY WITHIN THE LIMITS OF A COUNTY.

A bridge across a river dividing two counties is an entirety. In the nature of things it calls for unity of control.

In *Groley vs. Cal. Pac. R. R. Co.*, 134 Cal., 557,

the Supreme Court of this State held that subdivision 4 of section 25 of the county government act (Stats. 1891, p. 300, now sub. 4, sec. 4041 Pol. Code), giving the supervisors power to erect bridges, but providing that when the cost of erection of any bridge exceeds the sum of \$500, the board must advertise for bids, etc., had no bearing upon the authority of the board to contract for the construction of a bridge crossing a stream which separated two counties. The court says:

“As one-half of a bridge to be constructed over a river which is the boundary between two counties would be in each county, it is readily seen that its construction cannot be carried out under the provision of that subdivision. It is also evident that neither county would have the right to construct a bridge beyond its own boundary line, and there is no provision in the subdivision for any concert of action between the boards of the two counties, or for harmonizing any difference between them, if such should exist.”

In another case the Supreme Court of this State construed a statute providing that all franchises should be sold to the highest bidder, including franchises to operate ferries and collect tolls, and held the same inapplicable to ferries between two counties, upon the same line of reasoning, using the following language:

“In case the franchise should be sold to the highest bidder, which board of supervisors should

sell the same, and would the sale by the board of either county convey any franchise in the other county?, and in case each county should sell to different bidders, which one would be entitled to the franchises?"

Pool vs. Simmons, 134 Cal., 623.

The reasoning applies with equal force to section 4073 of the Political Code. There is no provision for concerted action between the two counties in said section.

This was emphasized in a very late case, construing subdivision 33 of section 4041 of the Political Code, in the following language:

"A bridge across a river dividing two counties is an entirety. In the nature of things it calls for unity of control. This is illustrated by the code sections authorizing the construction of toll bridges over waters dividing two counties (Pol. Code, Secs. 2843 *et seq.*). By these provisions the grant of the right to construct, the fixing of license taxes and tolls, and all details of regulation, are placed in the jurisdiction of the supervisors of the county on the left bank of the stream or other water. That no similar provision is found in the general enactment (Pol. Code, Sec. 4041, subd. 33) authorizing the grant of a right to take tolls upon a public highway, is persuasive evidence that the subdivision was not designated to include the case of a bridge over waters dividing two counties. It was certainly never contem-

plated that the board of supervisors of the county in which one-half of such bridge was located should have authority to grant a franchise to take tolls over such half, while the remainder of the bridge might be free and open. Here, as in the case of the construction of a new bridge (the case considered in *Croley vs. Cal. Pac. R. R. Co.*, *supra*), there is no provision for concerted action between the two counties. The reasonable interpretation of subdivision 33 of section 4041 is that the section, if it covers the case of a bridge at all, has reference only to bridges situated entirely within the limits of a county."

Gardella vs. Amador County, decided January 20, 1913, California Decisions, January 28, 1913, Vol. 45, No. 2381, p. 116.

II.

UNDER THE DECISIONS OF THE SUPREME COURT OF THIS STATE THE BOARD OF SUPERVISORS HAS PLENARY POWERS IN SUCH A CASE.

The only statute in this State referring to the construction by counties of bridges crossing streams separating two counties is found in the concluding part of section 2713 of the Political Code, which provides:

"Bridges crossing the line between counties must be constructed by the counties into which such bridges reach; and each of the counties into which any such bridge reaches shall pay such portion of

the cost of such bridge as shall have been previously agreed upon by the board of supervisors of said counties.

"This provision is plenary in its terms. . . . As this section of the Political Code imposes this duty upon boards of supervisors, and confers upon them the power to perform the act, but does not prescribe the mode in which the power shall be exercised, such mode as well as the extent of its exercise is to be determined by the respective boards in each particular case."

Croley vs. Cal. Pac. R. R. Co., 134 Cal., 561.

There has been no change in the law since that decision was rendered; and if section 4073 of the code had been enacted for the first time in 1897, as was claimed by counsel for respondent at the former hearing in this court, it would not alter the case, because the section does not apply to bridges between two counties. Nor does the fact, that said section 4073 is not in terms limited to bridges "within the county" affect the construction of said section. Subdivision 33 of section 4041 of the code, considered in *Gardella vs. Amador County*, *supra*, does not contain any such restrictive language and was nevertheless construed to refer only to bridges within one county. The absence of a provision in said section for concerted action between the two counties is persuasive evidence that the section was not designed to include the case of a bridge over waters dividing two counties.

III.

SECTION 4073 OF THE POLITICAL CODE BY ITS VERY TERMS AND LANGUAGE REFERS ONLY TO CHANGES AND ALTERATIONS OF THE WORK MENTIONED IN AND PROVIDED FOR BY THE CONTRACT.

This Court holds that the work and material in suit was not within the contemplation of the parties when they made the contract, was not within the terms of the contract, and was entirely outside of the contract.

In the opinion on file this work is called extra work. But we understand this Court to hold that it was not extra work within the meaning of that term as used in the concluding part of said section 4073, which provides that in no case shall the board pay or become liable to pay for extra work, etc.

Extra work, in that sense of the term, is work strictly incidental to the contract, and so intimately connected with it that it may be considered a part thereof.

But this work was new and different work and amounted to a new and different undertaking.

Smith vs. Salt Lake, 83 Fed., 787;

Smith vs. Salt Lake, 104 Fed., 466;

And authorities cited in briefs on file.

This Court so holds, and says:

“For that work the board of supervisors would not become liable except in the manner prescribed in said section.”

We respectfully insist that such new and different work is not within the terms and language of said section and is therefore not covered by it.

The headnote to the section is: “Contracts not to be altered, etc.” This expresses the scope and purview of the section, and is of as much importance in the construction of the statute as is the text of the section.

Barnes vs. Jones, 51 Cal., 306;

Sharon vs. Sharon, 75 Cal., 16;

Dungan vs. Superior Ct., 149 Cal., 101-102.

Clearly, the section was designed to regulate the *alteration* of contracts, and not the *making* of contracts. The decision of this Court in this very case is that in order to bind the county, a new contract should have been made in the mode and manner prescribed by said section. Only, this Court seems to hold that if, for instance, the board of supervisors has once let a contract for any distinct part of a public improvement, the incurring of liability for another and different part of such public improvement is a change or alteration of a contract entered into by the board, within the meaning of section 4073 of the Po-

litical Code, and hence that such liability cannot be incurred at all except in the mode and manner prescribed in that section.

We have earnestly attempted to find the view point from which the section might be construed in that way. But we find that a contract for new and different work is neither within the letter nor the spirit of the statute under consideration.

The manifest object of the section is to limit, restrict and regulate the power of *ordering changes and alterations* in contract work by the counties, by placing such power exclusively into the hands of the boards of supervisors and prescribing the manner in which such boards should exercise the same.

But the section itself, in terms, refers only to changes and alterations of the contract "with the consent of the contractor." The Legislature must be presumed to have known that the terms of a contract cannot be changed or altered without the consent of all the parties to it. Yet it saw fit to expressly refer to the consent of the contractor. Unless, therefore, the words "with the consent of the contractor" are treated as mere surplusage, which we are not ordinarily allowed to do, the section must be construed and read as being applicable only to the ordering of changes and alterations of the contract, which without the consent of the contractor cannot be ordered by the board. Clearly, then, the changes and alterations by the board, which the section is designed to regulate,

must be changes and alterations of work provided for and mentioned in the contract. Since to such changes and alterations, and to none other, the consent of the contractor would be required, the board of supervisors would not need the consent of the contractor before ordering new and independent work entirely outside of the contract; and it is not reasonable to assume that the Legislature intended to make the consent of the contractor a condition to the exercise by the board of its power to order new and additional work. The ordering of new and different work does not involve the change or alteration of an existing contract, within the meaning of section 4073 of the Political Code. There certainly is a broad distinction between ordering the change and alteration of a contract by agreement and with the consent of the contractor, and ordering new and distinct work entirely outside the contract.

However, there is more language in said section which argues in favor of this construction. The section provides for a two-thirds vote of the entire board. This means four out of five. No such requirement exists with respect to ordering the improvement in the first instance, the adoption of plans and specifications, and the awarding of the contract. There is a reason for this, which in itself demands that the section should be restricted in its application to changes and alterations of the work mentioned in and provided for by the contract. Such reason is found

in different sections in *pari materia*. We will refer to a few of them.

In the case of public buildings the board must adopt plans and specifications, and must invite bids and award the contract to the lowest bidder, regardless of the amount involved (Sub. 8, section 4041, Pol. Code). A similar provision is found with respect to bridges, the cost of which exceeds \$500 (Sub. 4, section 4041, Pol. Code). If the cost of construction or repair of a bridge is \$200 and less, the board seems to have plenary power; and if such cost is more than \$200 (but less than \$500, see above), the construction or repair may be accomplished directly by the board or let out at contract; but if let out at contract, there must likewise be public notice, and proposals and bids must be invited, and the contract must be awarded to the lowest bidder (section 2713, Pol. Code). Similar provisions are found in different sections of the code with reference to the purchase of materials, and the awarding of yearly contracts for supplies according to samples (sections , Pol. Code).

When plans and specifications have once been adopted, and the contract let accordingly, upon public notice and to the lowest bidder, there seems good reason why the Legislature should desire to put a check upon the power of the board to order changes and alterations of work already contracted for and to privately agree upon the cost thereof. But no reason appears why the ordering and contracting for new

must be changes and alterations of work provided for and mentioned in the contract. Since to such changes and alterations, and to none other, the consent of the contractor would be required, the board of supervisors would not need the consent of the contractor before ordering new and independent work entirely outside of the contract; and it is not reasonable to assume that the Legislature intended to make the consent of the contractor a condition to the exercise by the board of its power to order new and additional work. The ordering of new and different work does not involve the change or alteration of an existing contract, within the meaning of section 4073 of the Political Code. There certainly is a broad distinction between ordering the change and alteration of a contract by agreement and with the consent of the contractor, and ordering new and distinct work entirely outside the contract.

However, there is more language in said section which argues in favor of this construction. The section provides for a two-thirds vote of the entire board. This means four out of five. No such requirement exists with respect to ordering the improvement in the first instance, the adoption of plans and specifications, and the awarding of the contract. There is a reason for this, which in itself demands that the section should be restricted in its application to changes and alterations of the work mentioned in and provided for by the contract. Such reason is found

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When plans and specifications have once been adopted, and the contract let accordingly, upon public notice and to the lowest bidder, there seems good reason why the Legislature should desire to put a check upon the power of the board to order changes and alterations of work already contracted for and to privately agree upon the cost thereof. But no reason appears why the ordering and contracting for new

and different work, in the manner in which original work generally may be authorized and contracted for, should be hampered by this provision for a two-thirds vote of the whole board, as it would be if said section 4073 were applicable to such a case.

If this section were applicable to a case of this kind, two members of the board could defeat the undertaking entirely by withholding their consent to an "alteration or change of the contract," without which the undertaking could not possibly be completed, though they were powerless to prevent the execution of the original contract, and would have been powerless to prevent its completion but for an untoward circumstance such as was unexpectedly encountered in this case.

No such intent can reasonably be imputed to the Legislature.

The indiscriminate and often collusive ordering or making of changes and alterations in the details and work mentioned and provided for in contracts of counties, during the progress of the work, is properly restricted, and the making of necessary or *bona fide* changes and alterations in the details and work of such contracts is aptly regulated, in the manner prescribed by section 4073 of the Political Code. And the language of the section is appropriate to cover such cases. But the language of the section does not readily lend itself to describe facts and circumstances, such as are instanced by the present case. New and

distinct work, such as is indicated by the record here, is not fittingly described in said section. And the scheme and mode of procedure prescribed by the section is so variant from that provided elsewhere for the letting of contracts for public work, that the section should not be applied to new and distinct work, outside of the contract, either voluntarily ordered or made necessary in material quantities by unforeseen conditions underground.

IV.

THE REASONABLE INTERPRETATION OF SAID SECTION IS THAT IT REFERS ONLY TO THE ORDERING OF WORK AND MATERIAL OF A LIKE CLASS, KIND AND QUALITY AS THAT WHICH IS REQUIRED FOR THE WORK CONSTITUTING THE SUBJECT MATTER OF THE CONTRACT, AND THAT THE SECTION CONTEMPLATES NO MORE THAN A POSSIBLE DEPARTURE FROM THE ORIGINAL DESIGN OR DETAILS OF THE PRINCIPAL AND INCIDENTAL WORK SPECIFICALLY CONTRACTED FOR. THE SECTION CLEARLY DOES NOT COVER WORK WHICH THE BOARD MIGHT, AFTER THE LETTING OF A CONTRACT, DESIRE TO HAVE EXECUTED, BUT WHICH WOULD NOT CONSTITUTE AN INTEGRAL PART OF THAT SPECIFICALLY CONTRACTED FOR.

Such a construction was given to the clause of a contract, whereby it was provided that the owner could request alterations, deviations, omissions, or additions,

the cost to be added or deducted from the contract price or the amount of the contract.

St. John vs. Potter, 19 N. Y. Supp., 230, 232.

We believe that section 4073, Pol. Code, means no more and should receive a similar construction.

This Court holds that the county in reality assumed that bedrock existed under the bed of the stream 27 feet 6 inches below the spring line of the arch of the bridge, as denoted on the map, and that in legal effect the representation on the map as to the presence and location of bedrock at the center pier was intended and designed to denote approximately its true location. And in conclusion this Court holds:

“We think, as indicated, that the parties assumed that bedrock existed as delineated, and that it was tacitly understood that the delineation was approximately correct, and it was in that view that the minds of the parties met. Within the terms of the contract, therefore, Jorgensen Bros. were not required to sink and construct an additional 24 feet of the center pier to bedrock as it was found to exist.”

This additional work was, therefore, beyond the scope of the work, as contemplated by the parties.

When the necessity for it became apparent the board of supervisors could not have contracted for it under the provisions of section 4073, because it was

new, different and independent work which the statute of this State would have required to be let to the lowest bidder.

All through the provisions of our Political Code runs the fundamental idea of competitive bidding and awarding contracts to the lowest bidder. Section 4073 dispenses with this requirement and contemplates a private contract between the board of supervisors and the contractor, in the cases for which that section was intended to provide. It is obvious that the said section must be restricted in its application in order to preserve its usefulness, and to prevent it from coming in conflict with other sections of the code.

For instance, sub. 4, section 4041, of the Political Code empowers the boards of supervisors to construct bridges within their respective counties, and in a proviso to the authority there given said statute directs that

“where the cost of the construction of any bridge . . . exceeds the sum of \$500, they must cause to be prepared and must adopt plans and specifications, strain sheets, and working details, and must advertise for bids for the construction of such bridge, in accordance with the plans and specifications so adopted. All bidders shall be afforded opportunity to examine such plans and specifications, and said board shall award the contract to the lowest responsible bidder, and the plans and specifications so adopted shall be attached to and become a part of the contract; and the person or corpora-

tion to whom the contract is awarded shall be required to execute a bond, to be approved by said board, for the faithful performance of such contract."

It is clear from the foregoing provisions, that the board of supervisors cannot let out private contracts, under section 4073 of the Political Code, for any part of an improvement which was omitted, either intentionally or by mistake, from the plans and specifications adopted and from the contract awarded under competitive bidding. To permit them to do so would result in a practical annulment of the provisions for competitive bidding.

This point was considered in a case where the question arose under the provisions of a city charter similar to those of said section 4073.

In that case the city council ordered new and additional work, and it was claimed that it was extra work which the council could order without advertising, under a clause in the charter authorizing the council to make changes or alterations in contracts. But the Supreme Court of Michigan held to the contrary, and said that said charter provision did not apply, using the following language:

"It is true that the paving of the gutters was within the scope of the improvement, but this did not confer upon the defendant the right to dispense with the charter requirement for competitive bids. The whole improvement required a certain num-

ber of cubic yards of excavation and embankment, also road gravel, screened gravel, top dressing, and a certain number of thousand feet of timber, and these were stated in the estimates. If the contract had been for making the excavations, which included only about one-third of the cost of the original contract, would it be contended that the defendant could let private contracts for the balance of the work upon the theory that it was within the scope of the improvement? The result would be a practical annulment of the provision for competitive bids. Under this theory a contract to grade might be extended into a contract to pave; a contract to pave with stone into a contract to pave with wood or asphalt at a greatly increased cost; a contract for any distinct part of a public improvement into one for the whole. . . . The changes covered by the above section of the charter, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. They cannot include distinct work not therein mentioned nor contracted for. It is of no consequence that a part of the public improvement is omitted from the estimate and contract by mistake. The result is the same as if it were intentionally done. This work of paving the gutters was entirely outside the contract. The private contract for the performance of the same was without authority and void."

Ely vs. City of Grand Rapids, 47 N. W., p. 448;
Auditor General vs. Stoddard, 110 N. W., 945,
 946.

The contingency which did happen in this case should have been within the contemplation of the county officers at the time of adopting the plans and specifications and letting the contract for the construction of the bridge, and the plans and specifications, the bids, and the contract should have made provision for this work conditionally, and if the bridge had been entirely within one county, the omission of said work from the plans, advertisement, bids and contract would have rendered the entire contract null and void.

McBrien vs. Grand Rapids, 22 N. W., 206;
Williams vs. Topeka, 118 Pac., 866;
City Street Imp. Co. vs. Kroh (Cal.), 110
 Pac., 937;
In re Eager, 46 N. Y., 105-107.

Since this work should have been properly provided for in the plans and specifications and let out conditionally under competitive bidding and by the original contract, it naturally was and is original and not extra work, or altered or changed work, such as is referred to by section 4073 of the Political Code.

Also, it was new, different, and independent work because it was of a different and more difficult class than any of the work contemplated and provided for by the plans and contract. The plans showed bedrock at a depth of 2 feet 6 inches under the bed of the river (Transcript, folio 98, page 92). In reality it was

found 26 feet 6 inches below the bed of the river. The one was practically surface work. The other was difficult underground work, requiring new appliances, different treatment, and a more expensive and difficult method in its accomplishment. The compensation for this work could not be measured or adjusted on the basis of the price fixed by the contract for similar work, because there was no similar work mentioned or provided for in the contract.

Annapolis, etc. Co. vs. Ross, 11 Atl., 820;
Wood vs. Fort Wayne, 119 U. S., 320-321;
Mulholland vs. New York, 20 N. E., 858;
Cook County vs. Harms, 108 Ill., 151;
Merch. Exch. vs. Butler, 3 Tex. App. Civ.,
 378;
Allen vs. Melrose, 67 N. E., 1062;
Chicago vs. Sexton, 2 N. E., 265;
Lee vs. Brayton, 26 Atl., 256.

The fact that certain new and distinct work, outside of the contract, may be absolutely necessary to complete the work of the contract, can make no difference in connection with the construction of said section. There is no legal connection between such work and the work mentioned and provided for in the contract.

Such work requires a new contract made in the manner prescribed for the letting of original con-

tracts, and section 4073, Pol. Code, does not relate to that subject matter.

But when in addition to that the new and distinct work is of a different or more difficult class than any specified and provided for in the contract, it would be contrary to the general policy of the law, and in clear violation of the statute providing for public notice and competitive bidding, if such work were let out at private contract or in the manner provided in said section 4073.

Brady vs. Mayor, 20 N. Y., 312;

In re Eager, 46 N. Y., 105-107;

In re Merriam, 84 N. Y., 601-605;

In re Rosenbaum, 23 N. E., 172;

Murphy vs. City of Albina (Ore.), 29 Pac.,
353;

Kamrath vs. Albany, 28 N. E., 400;

Ely vs. Grand Rapids, 47 N. W., 448;

Auditor General vs. Stoddard, 110 N. W., 946;

City St. Imp. Co. vs. Kroh (Cal.), 110 Pac.,
937;

McBrien vs. Grand Rapids, 22 N. W., 206;

Williams vs. Topeka, 118 Pac., 866.

V.

THE REASONABLE INTERPRETATION OF SECTION 4073 OF THE POLITICAL CODE IS THAT THE SECTION REFERS ONLY TO CHANGES OR ALTERATIONS WHICH CAN BE MADE WITHIN THE LIMITS OF THE CONTRACT PRICE OR AMOUNT OF THE CONTRACT, AND WITHOUT INCREASING THE COST OF CONSTRUCTION.

Such a construction of the section would be almost imperatively required if the section did not contain the words: "and the cost thereof agreed upon between the board and the contractor."

The section would then read as follows:

"Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified in writing. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure."

The concluding clause of the section is an absolute inhibition against payment or liability for extra work, or extra material, in the technical sense of the term.

It must be remembered that section 4073, Pol. Code, is not a grant, but a limitation of power. And it would be a violent presumption to assume that the section was meant to cover more than extra work or changes in the technical sense of the term. Such a presumption should not be indulged in the absence of language manifestly indicating such an intent.

The question is, conceding that the concluding part of the section is preclusive of any liability for extra work, was the forepart of the section designed to regulate the manner of incurring liability for new, different or distinct work, such as we have here, and which is not forbidden?

We think that no such construction of the section is required merely because of the words: "and the cost thereof (shall be) agreed upon between the board and the contractor," which are found in the section after the words "in writing."

A change or alteration, or an omission, is often ordered, which does not increase the cost of the building or structure, but which in fact results in a saving or reduction of cost. And an addition or extra work can often be agreed upon, within the amount of the contract and without additional cost or expense. In such case it is proper that there be an adjustment of details and items, and, if the change or alteration results in a saving, that there be a deduction agreed upon. Or, in the language of said section, the par-

ticular change or alteration should be specified in writing, and the cost thereof agreed upon.

Such a change or alteration requires "the consent of the contractor" referred to in the section. The words "with the consent of the contractor" are descriptive of the kind or character of change or alteration which the Legislature had in mind. Ordinarily it does not lie in the mouth of the contractor to object to new, different and distinct work, for which the owner becomes obligated to pay when he orders it. Such work does not impair, change, or alter the existing contract. And, hence, when the Legislature dealt with a change or alteration of the contract with the consent of the contractor, it is fair to assume that it did not mean to refer to an order or contract for work entirely outside of the contract.

We think that the section contemplates no more than a possible departure from the original design or details of the work contracted for, or necessary or convenient alterations or changes which can be ordered or agreed upon entirely within the scope and limits of the contract, and subject to the paramount condition that in no case shall the board pay or become liable to pay for extra work occasioned by such changes or alterations. The latter part of the section does not forbid extra work, but merely forbids payment or liability therefor. And the forepart of the section does not in terms or by necessary implication refer to the making of a contract for new and inde-

pendent work, that is to say, for work outside of the contract. The term extra work, in the sense in which it is used in the latter part of the section, means a change or alteration of the contract within the meaning of the forepart of the section. The change or alteration of the contract, or extra work, referred to in the forepart of the section, is expressly given a qualified meaning by the additional words "with the consent of the contractor," and as thus limited it means substantially the same thing as a change or extra work for which no payment shall be made or liability incurred, as provided by the latter part of the section. Thus the entire section refers to one subject matter.

Such a construction is in harmony with all the other sections of the code in *pari materia*. It fits into the entire scheme of legislation. It brings section 4073 within the policy of the statutes providing that all contracts, except in some cases, contracts below a certain amount, shall be awarded upon public notice to the lowest responsible bidder. It brings said section within the spirit and intent of the law providing that plans and specifications must be adopted, which shall include and provide for a complete undertaking, and all the principal and incidental work within the scope of the improvement to be let and contracted for. The policy of the law is to prohibit additional expense or liability for extra work in any case. Section 4073 so provides most explicitly and

emphatically, and this provision of the section is calculated to prevent the provisions for competitive bidding to be circumvented by intentional omissions of parts of the work from the plans, specifications and advertisement, or to be defeated by such omissions due to negligence, carelessness, mistakes, or unavoidable and unforeseen circumstances.

Indeed, it would be strange for the Legislature to entirely preclude and forbid liability or payment for extra work and materials, with that end in view, and in the same breath and by the same section sweep away all those safeguards and precautions and to contemplate or permit unlimited liability to be incurred by private arrangement between the board and the contractor for new and additional work outside of the plans and the contract, in the manner provided by section 4073 of the Political Code.

And such a construction of the section as is here contended for restricts the section in its meaning and application to the scope of the subject expressed in the headnote or title of the section, which is: "Contracts not to be altered, etc.," the word "etc." evidently referring to the inhibition against paying or becoming liable for extra work. So that the headnote of the section means the same as if it read: "Contracts not to be altered by paying or incurring liability to pay for extra work or material." And that is the scope of the section and of its application.

Barnes vs. Jones, 51 Cal., 306;

Sharon vs. Sharon, 75 Cal., 16;

Dungan vs. Superior Court, 149 Cal., 101-102.

The section does not entirely forbid alterations of contracts, but forbids payment or liability for extra work, and regulates the mode and manner of ordering changes or alterations of contracts which can be made within the absolute inhibition of the section.

That particular subject is not treated or regulated anywhere else in the code, and there are many manifest and obvious reasons for expressly regulating it. So that it is not necessary to enlarge the scope of the section by construction for the purpose of effectuating it and finding for it a subject upon which to operate, which otherwise we might be compelled to do.

There is only one more point to be considered in this connection. Section 4072 of the Political Code regulates the alteration or change of plans and specifications by the board of supervisors, and provides that they shall not be altered or changed "whereby the cost of the building or bridge is increased," except by a two-thirds vote of the board. It might be claimed that this section, immediately preceding section 4073 under discussion, has some connection with the latter section. It might be argued that the two sections belong together, and that section 4073 was designed to regulate changes and alterations of contracts, when the board has changed the plans and specifications and

thereby increased the cost, in the manner provided by section 4072.

We think that there is no room for such a contention when section 4072 is read and construed as it must be.

In the first place section 4072 refers to changes in the plans increasing "the cost of the building, bridge, or structure," and not merely to an increase of the cost of constructing the building as originally planned. Primarily this section refers to a change of plans and specifications. The plans may be changed so as to decrease the cost of the building or bridge, or so as to increase it. In other words, this section refers not only to changes within the original scope of the improvement, but also to radical changes which might alter the whole scope, character or extent of a public improvement of the kind mentioned in the section.

If plans or specifications are ever changed or altered in that manner or to that extent, it necessarily must be before the contract is let. We do not mean to be understood as saying that the scope, character, or extent of a public improvement of the kind enumerated in the section cannot be radically changed by adding to or enlarging it, and that plans and specifications cannot be provided for such additional part, after a contract has once been let. But we do mean to say that such a transaction involves the original adoption of a new and independent set of plans and specifications, having no *legal* connection with the other, or the

adoption of an original set of plans for a new and distinct undertaking having no *legal* connection with the other, and does not involve a change or alteration of plans and specifications within the purview and meaning of section 4072.

The scope of this section, like that of the other, is defined by its headnote, which reads: "Plans, etc., not to be altered."

Inasmuch as there can be no binding plans until they are finally adopted by the board, we take the headnote of the section to mean what it says, and that the change or alteration provided for in the body of the section refers to plans once adopted but not yet final or acted upon by advertising "for bids for the construction of the bridge (or building) in accordance with the plans and specifications so adopted," and by awarding the contract to the lowest bidder and "attaching to and making a part of the contract" such plans and specification.

Necessarily, if the change of the plans is such as to decrease the cost of the building or bridge, it must be made before the contract is let, because afterwards such a change could not be made without the consent of the contractor. Subsequent changes are provided for by section 4073, which speaks of the consent of the contractor, whereas section 4072 does not refer to such consent. Consistently with such contention, section 4072 speaks of an increase of cost of the building, whereas section 4073 does not, but on the contrary

absolutely forbids it. A clear indication that said sections are not intended to supplement each other, or that they are in no wise related, which becomes still more manifest when we consider that there is nothing in section 4072 preventing a change of plans downwards in cost by a majority of the board, whereas the change or alteration in section 4073 requires a two-thirds vote of the board, while at the same time it must not involve payment for extra work or extra materials.

This construction of the two sections also finds support from a reference to other sections of the code in *pari materia*.

In the case of a bridge, if the cost of construction exceeds \$500.00, the board "must cause to be prepared and must adopt plans and specifications." This means that the board must finally adopt the same before the contract is let, since the power of the board to enter into the contract depends upon such final adoption of the plans and specifications, as is evidenced by the language of the statute immediately following, to-wit: "Must advertise for bids for the construction of such "bridge in accordance with the plans and specifications so adopted . . . and said board shall "award the contract to the lowest responsible bidder, "and the plans and specifications so adopted shall be "attached to and become a part of the contract."

Sub. 4, section 4041, Pol. Code.

In the case of a building it is provided: "None

“of the aforesaid buildings shall be erected or constructed until the plans and specifications have been made therefor and adopted by the board. All such buildings shall be erected by contract, let to the lowest responsible bidder, after notice by publication.”

Sub. 8, section 4041, Pol. Code.

As has already been shown in another part of this petition and argument, the policy of these provisions of law is to give the county the benefit of competitive bidding. To that end the board must not be permitted to omit any part of the contemplated improvement from the plans and specifications, upon which bids are had and the contract is based, and then add to the improvement by changing the plans afterwards and letting out the added work at private contract. This would be against the spirit and intent of the provision for competitive bidding; and to permit the board of supervisors to do so would be to permit them to circumvent and violate the law.

By all the known rules of statutory construction section 4072 must be held to refer to a change of plans and specifications at any time before the letting of the contract, but not afterwards.

We must assume that if the Legislature had intended otherwise, it would have so declared directly and unequivocally.

The provisions of section 4072 do not by their terms

apply to changes and alterations of plans and specifications after the letting of the contract. And the provisions of section 4073 providing for changes and alterations of contracts do not in terms apply to changes and alterations whereby the cost of the building or bridge is increased. The provision in section 4072 referring to changes of plans and increased cost cannot, in the absence of some direct and unequivocal language, be construed as importing into section 4073 an authorization to effectuate a change of the plans and specifications whereby the cost of the bridge is increased, after the contract has been let, and by altering and changing the contract.

Before the statute, prescribing full and complete plans and specifications of the entire contemplated improvement, as a whole, and requiring competitive bidding, can be held to have been superseded by sections 4072 and 4073 together, a manifest legislative intent to that effect must clearly appear. This rule of construction is pertinently illustrated in a case to be cited, by the following apt language:

“The provisions of the first part of section 25 do not by their terms apply to accepted streets, but merely authorize the city council to ‘repair’ streets upon which certain work has been done; and the provisions of the latter part of the section requiring advertising and assessment, when the work to be done upon an unaccepted street is new work of the same character as had been previously done,

cannot be construed as importing into the first part of the section a condition that the repairs therein authorized are to be made upon an accepted street. We must assume that if the Legislature had intended that the express provision which it made in section 20 for the improvement and repair of accepted streets, and for a fund out of which the expense should be paid, should be superseded by the provisions of section 25, it would have so declared in some direct or unequivocal language."

Santa Cruz R. R. Co. vs. Broderick, 113 Cal.,
633-34.

Furthermore, if section 4073 were held to have been intended to provide the mode and manner of effectuating and carrying out the change of plans and specifications referred to in section 4072, it would also have to be held that the consent of the contractor is necessary to such change and alteration; since under section 4073 the contract cannot be altered without such consent, or rather, since that section only refers to a change or alteration of the contract "with the consent of the contractor," and to "cost agreed upon between the board and the contractor." The power of the board then is limited to a transaction or agreement between the board and the contractor. The board under section 4073 is powerless to deal with any one else but the contractor. Suppose he were unable from any cause to handle the job after the plans and specifications have been changed under section 4072 and that he

refused to give his consent to any alteration or change of the contract as required by section 4073. Clearly, in such case, the changes or alterations of plans and specifications made by the board under section 4072 could not be effectuated at all, since the mode and manner prescribed by section 4073 is exclusive, and if that section did apply the thing would have to be done in that mode and manner, or not at all. Besides, why require a two-thirds vote for a change of the plans, and again require such a vote for a corresponding change of the contract? The cost of the change or alteration can be agreed upon by a majority of the board in any event, because section 4073 does not in that connection require a two-thirds vote of the Board. So that there is no possible reason for requiring a two-thirds vote for a change of the plans, as provided by section 4072, and again a two-thirds vote for a corresponding change of the contract, as provided by section 4073.

We respectfully submit that section 4073 of the Political Code of this State is inapplicable to the case at bar, and hence, that the said statute is not preclusive of the county's liability for the work in suit, and inasmuch as it is clear from the later decision of *Gardella vs. Amador County* that the decision in *Croley vs. California Pacific Railroad Company*, 134 Cal., 557, wherein it is decided in effect that the supervisors of a county have plenary power in the making of contracts for the construction of bridges crossing

streams which separate two counties, is still the rule in this State, that therefore with reference to the added structure in the case at bar the counties would be bound by the implied contract, or the equitable estoppel, as the case may be, arising from the facts that they, through their superintendent, insisted that the contractor should construct the addition to the pier and that they afterwards accepted the bridge as an entirety and have since continued to use it.

See Point V, Reply Brief of Plaintiff in Error, and authorities cited.

For the foregoing reasons it is respectfully submitted that a re-hearing should be granted to this Court.

F. J. SOLINSKY,
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PAUL C. MORF,
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State of California,
City and County of San Francisco.—ss.

We, the counsel for said petitioner, do hereby certify that in our judgment said petition is well founded, and we further certify that the same is not interposed for delay.

F. J. SOLINSKY,
FRANK R. WEHE,
PAUL C. MORF,
Attorneys for Petitioner.

No. 2121

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. WILL JORGENSEN,

Plaintiff in Error,

VS.

COUNTY OF TUOLUMNE (a municipal
corporation of the State of California),

Defendant in Error.

ORAL ARGUMENT OF WALTER SHELTON ON BEHALF OF DEFENDANT IN ERROR.

Preface.

In view of the fact that the reply brief of plaintiff in error was filed after oral argument and is to a great extent a reply to that argument, and since there was, therefore, no opportunity to discuss its various features, permission has been granted defendant in error to edit and file the material part of the oral argument in its behalf.

Construction of the Contract.

Plaintiff in error has never seen fit to confine himself to any particular theory upon which to base

a recovery and we are, therefore, put to the necessity of answering the sufficiency of his case from every possible point of view. There are only two theories upon which a recovery could possibly be had; one, that plaintiff was required by the contract to furnish labor and material in suit, but notwithstanding such requirement he is entitled to recover because of the warranty or misrepresentation of a material fact; the other, that plaintiff was not required to furnish such labor and materials under the contract and that by reason of his having done so, a liability in law was raised upon which he can recover.

According to our view of the case, the plaintiff was required to furnish the labor and material in question in order to fulfill his promise and agreement; that the performance of this work was only the performance of his contract for which he was paid when he received the contract price. In section three of our brief we have already quoted various provisions of the contract and stated in a general way our reasons why we think this view is the correct construction of the contract in suit. It will, therefore, not be necessary to repeat those reasons here, and we shall content ourselves with a brief statement of those principles which we think will answer plaintiff's objections on this point.

Plaintiff's contention is, briefly, that the representation in the plans as to the length of the middle pier is such a limitation of the contract that everything done below the point indicated is outside its

terms and that the performance of the contract did not require plaintiff to furnish such labor and materials; whereas, it is our conclusion that the express terms of the contract stating its fundamental purpose and main intent are controlling and cannot be limited or abrogated by any mistake in matters of description. There is no question but that the first purpose of the contract was to provide a serviceable bridge supported by piers with foundations in bed rock and that this plain intent could not be abrogated by any repugnancy in the detail description set forth in the plans, for, as stated in section 1650 of the Civil Code, particular clauses of a contract are subordinate to its general intent.

Plaintiff points out the clause in the specifications which requires the bridge to be of the *dimensions* shown on the plans and insists that since the distances stated in the plans as to certain dimensions of the bridge, such as the width of the bridge and height of the railing, are controlling, therefore the length of the middle pier stated in the plans must, likewise, be accepted as absolute and consequently the controlling provision of the contract on this point. Assuming, without admitting, that certain dimensions showing on the plans, such as those stating the width of the bridge, are controlling, the argument relative to the pier based upon that analogy is we think unsound for the reason that the true dimensions of the pier as shown on the plans is from the spring line of the arch to bed rock whether that distance be great or small. In

this connection the plans do not simply show a distance projected into space without any objective, as in the case of the width of the bridge or the height of the railing where the measurements in the plans stand alone and are absolute; they show something more than a projected line and the length thereof. The survey represented on the plans shows first a specific point, the spring line, that is, the base of the arch, so connected with natural objects on the bridge site as to make its location definite and certain. The plans also show as another objective point the bed rock in the center of the stream whose actual location on the site could also be established; and finally they show a pier extending from one to the other. But the plans, having been drawn to scale, can, by mathematical computation, be said to state the distance between these two points inaccurately; and it is therefore argued that the real dimensions of the bridge shown on the plans and called for by the contract are not to be measured from the points designated in the plans, but merely by the distance stated, whether such distance was or was not the actual distance between those two all important points. Must all these representations on the plans showing essential objective points and calling for a pier from one to the other as well as the fundamental purpose of the contract requiring an entire and complete structure yield to the simple statement of distance in feet and inches? Can it be said that a statement gathered from computation by scale as to the length of the

pier in feet and inches is so all controlling that if the actual distance to bed rock had been ten feet less than the length of the pier shown on the plans, it would have been necessary, nevertheless, under the contract for the plaintiff to continue the excavation in bed rock for ten feet in order to comply with the contract? Of course not. It is a well settled rule of law that in matters of description, courses and distances yield to the actual location of specified points. Whenever a survey, as in this case, shows the undisputed objective points and states the distance between them but states it erroneously, the statement of distance is always discarded and the actual distance between the established points accepted as the true description. When repugnant, established points control; courses and distances yield (*5 Cyc.* 913). This specific rule is in keeping with the general principle announced in section 1650 of the Civil Code heretofore cited.

The principle that the general intent and fundamental purpose of a contract will be followed regardless of inaccuracies or repugnancies in matters of detail and description, finds specific application to construction contracts like the one at bar in the cases which we have cited in our brief. These cases are distinguished from those cited by plaintiff and the principle involved well stated by Mr. Wait in section 240 of his valuable treatise on engineering contracts, where it is said:

“The American courts have distinguished those cases in which the contractor is merely

to build according to certain plans and specifications from those cases in which he is not only to build according to the plans and specifications, but is also to completely finish and deliver up a structure, ready for use as it were. So where a building was to be built according to very detailed plans and specifications, and owing to the latent condition of the soil the foundations sunk, the court held that a stipulation in the contract by which the contractor undertook 'to completely finish and fit for use and occupation' the buildings, was a covenant by which he was bound."

The case there referred to is that of *Dermott v. Jones*, 2 Wall. 1. As will appear from a reading of that case, a performance of the contract was not accomplished by following the plans alone because the general intent of the contract to build and deliver a complete structure controlled the various provisions of the plans, just as in this case the controlling provision in the contract is the undertaking "to provide a complete structure", so that the bridge when completed would "support with safety at least a live load of twenty tons concentrated on any sixteen square feet of deck".

Likewise in *School Trustees v. Bennett*, 27 N. J. L. 513, it was held that a provision in the contract sued on requiring plaintiff to complete a building for an entire price is controlling and he must do everything required to that end and if necessary, he must drive piles to furnish sufficient foundation although the contract did not call for them, and regardless of whether or not the contract contained

a trade phrase which meant that the foundation wall should be eight feet deep.

The point is clearly illustrated in *Dean v. Mayor*, 167 N. Y. 13, 60 N. E. 236, wherein the municipal authorities advertised for bids for the laying out of a new street and an agreement was entered into in which plaintiff agreed that he would "complete the entire work in substantial accordance with the specifications and plans therein mentioned", but the plans showed several hundred feet less work than the general terms of the contract indicated, thus presenting a situation similar to that now before the court. In deciding the point favorably to our contention the court said:

"In my opinion, if there is a discrepancy between the contract of the parties and the plan of the work to be performed under it, the former should control. I do not think that the implications from the plan, which seem to have influenced, more or less, the opinion of the majority below, should prevail over the clear terms of a contract, wherein the contractor has covenanted to furnish all the materials and labor for the performance of a certain described work, directed by the common council and advertised for by the department. * * * The proceedings, which preceded the making of the contract and authorized it, indicated an intention to carry out the ordinance by an entire contract and the office of the plan was to show the manner of performance. * * * I am of the opinion that as the parties have contracted for the doing of a work prescribed by a municipal ordinance, the agreement must be deemed to relate to the work as directed and to control, and that the plan accompanying is

subsidiary thereto. The contract expressed, and was intended to express, the agreement of the parties to it and measured the extent of their several obligations; while the plan, in accordance with which the contractor agreed to complete the work, was the chart by which he was to be guided in its performance."

These cases are discussed at length not only to illustrate the principles which we are urging but also to show that such principle is properly applicable to the facts at bar.

The cases cited by plaintiff do not really quarrel with the point here made. They are not cases calling for a complete structure and are not, for the most part, entire contracts providing for the payment of a lump sum. They are, therefore, distinguishable as contracts to carry out the requirements of specifications and cannot be treated as contracts to deliver a complete structure, as is the case here. In the case of *Delafield v. Westfield*, 28 N. Y. Sup. (Supreme Ct. Gen. Term) 443, in *Langley v. Rouss*, 82 N. Y. Sup. 1082, and in *Smith v. Salt Lake City*, 83 Fed. 784; same case in the Circuit Court of Appeals, 104 Fed. 457, cited by plaintiff on this point, the contracts were not entire in the sense that a structure was to be completed for a lump sum, but the contracts provided for a certain price per unit of work; and in the federal case there was no provision in the contract at all fixing the amount of work, so of course the specifications were controlling. Furthermore, in that case the contract was let for the construction of an aqueduct along a par-

ticular route of construction and it was required along an altogether different and more expensive line—a clear case of making a new contract by the acts of the parties; the only question there involved was whether an agreement to construct a pipe line in one place binds a party to construct it in a different and more difficult place.

In *Langley v. Rouss*, 82 N. Y. Sup. 1082, there was no undertaking to complete a structure, but merely to perform a fractional part of the work.

Horgan v. Mayor, 55 N. E. 204, is also cited. The only question presented there, material to this point, is whether or not a contract to furnish “all the labor and material required for conducting the flow of water and draining off the water from the bottom” could be so construed as to require plaintiff to pump water out of the pond when the sewer provided for draining off the pond failed to fulfill its purpose. In the light of surrounding circumstances, the court held that the terms “conducting the flow and draining off from the bottom” could not be so construed as to include *pumping* the water out over the side of the pond.

Plaintiff seeks to distinguish the case of *Stuart v. Cambridge*, 125 Mass. 102, cited by us in our opening brief, from the case at bar. In that case the plans show definitely the depth of the foundation, whereas, the specifications required the foundation to go to sufficient depth to reach solid ground. The plans in that case represented the depth of solid

ground as definitely as did the plans here, but it was, nevertheless, held in that case that the specifications and not the plans should be followed. We fail to see any material distinction between the specifications in that case and the one before the court. In neither case did the specifications attempt to locate bed rock. In this case the specifications contained the simple absolute requirement that the foundations shall extend to bed rock, whereas in that case the same provision was embodied in the specifications with the qualification that the foundations must, notwithstanding the depth to solid ground be at least fourteen inches deep. It seems to us the two cases are perfectly identical.

In the case at bar, we are also aided by the express provision quoted in our brief to the effect that any representation contained in the plans should not limit the requirements of the specifications, and vice versa.

For these reasons, as well as those stated in our brief, we believe plaintiff was required to furnish the labor and materials in controversy in order to perform his contract. On page 17 of plaintiff's reply brief it is stated that it was necessary for plaintiff to furnish the labor and materials sued for in order that he might not lose the work already performed, and it is also further stated that he either had to do the work or be placed in the position of a defaulter under the contract with the county. In this statement we heartily agree, because, for the

reasons already urged, we think the performance of the contract required him to do those things.

No Action for Warranty or Misrepresentation.

As a consequence of the foregoing conclusion, we believe that if plaintiff is entitled to any relief at all, it is not upon the theory of a new contractual obligation created by law because nothing was done outside the contract, but upon the theory of a warranty as to the correctness of the plans or for the misrepresentation of a material fact.

We think we have already shown fully in our brief that plaintiff is not entitled to recover upon the theory of an implied warranty because warranties are not implied under the facts stated and for the further reason that the law casts upon plaintiff the duty to determine for himself whether or not the proposed plans and specifications correctly outline the work to be completed.

Plaintiff seeks to obtain comfort on this point out of section 1656 of the Civil Code, but the argument there advanced is fully answered by the quotation in *Thorne v. Mayor*, set forth in our brief. A further reading of that case shows it to have been the opinion of the House of Lords that any custom or usage of contractors under which they rely on the specifications is "an usage of blind confidence of the most unreasonable description". If the requirement in the specifications that bidders should view

and judge for themselves of the nature and character of the *work* on the ground means anything at all, it is certainly clear that it was not the intention of the county to warrant the accuracy of the plans and specifications.

If this work is to be treated as covered by the contract and there is no implied warranty, recovery must be based, if at all, upon the intentional misrepresentation of a material fact. The record in this case does not show an intentional misrepresentation but does show an equal opportunity available to both parties to determine the correctness of these representations. This particular feature of the case has already been fully treated and nothing remains to be done, except to consider plaintiff's claim that a cause of action for fraud and deceit may be maintained against a county in this state. Plaintiff does not undertake to upset the general proposition that a county in California can not be sued *ex delicto*, but claims that an exception exists in the case of matters arising in connection with public highways and bridges, and cites the case of *Colman v. San Mateo*, 75 Fed. 520. This case, we think, never was the law and was certainly repudiated by Judge Morrow himself in the case cited in our opening brief. The matter has been squarely adjudicated in *Huffman v. San Joaquin Co.*, 21 Cal. 426, where it was decided that

“a county is not liable in damages at the suit of an individual for injuries sustained by him in consequence of the want of proper repairs to a bridge on a public highway of the county”.

Claim Barred by Limitation.

We have already fully discussed the facts of the case showing that if any collateral liability could or did arise against the county by reason of any misstatement in the plans, it arose at the time of the execution of the contract or, at the latest, when the error was discovered and the plaintiff had completed performance of the work in controversy. This was more than a year before the claim was presented to the board and any claim that may have existed was, therefore, barred under section 4075 of the Political Code. Plaintiff undertakes to answer us on this point by the contention that the claim in suit does not come within the provisions of this section of the Code and that the cases cited in our brief requiring such claims to be presented to the board of supervisors, were under statutes materially different from the present section. In this, the plaintiff overlooks the case of *Rhoda v. Alameda Co.*, 52 Cal. 350, which was decided under a statute absolutely identical with the one here involved. The section then provided that the "board of supervisors must not hear or consider *any claim*" unless presented, which is the identical language of the present statute. Under such a statute it was held that the words *any claim* covered a suit for damages to property and that the presentation of the claim to the board of supervisors was a condition precedent to recovery. And in *McCann v. Sierra Co.*, 7 Cal. 121, it is said that

“the intention of the Legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit.”

Plaintiff has cited a few cases against municipal corporations which are based on altogether different statutes and cannot be treated as applicable. It will be borne in mind that counties are mere political subdivisions of the state and cannot be sued except upon compliance with statutes granting a right of action and that the general principles relative to a suit against municipal corporation are not to be accepted as controlling.

No Implied Contract.

Assuming that this work was not required by the contract, was not done under the contract, and that, as plaintiff says, this work “was new and additional” work outside the contract, is plaintiff entitled to recover? We think not. In section 10 of our brief, we have already set out the statute and referred to the cases supporting our position. We shall therefore proceed at once to consider plaintiff’s objections to our conclusions.

Plaintiff insists that the statute quoted relates only to extra work or extra compensation for work within the terms of the contract. This, it seems to us, is

self-contradictory. Work required by and done under a contract cannot be extra work, because the very meaning of "extra work" is something outside and beyond the terms of the contract. The only way there can be such a thing as extra work under a contract, is in those cases where the agreement makes provision for work which is not required by the contract but may be decided upon by the parties in the course of construction. In such cases we find loose language speaking of extra work done under the contract, but by what rule of construction can we read such a meaning into this statute, and especially in this case where the contract provides for a complete structure, thereby impliedly negating the idea that any work except that called for by the contract was ever to be performed.

The statute does not say that the board shall not pay for extra work done *under a contract*, but without restriction says that the board shall not pay for *any* extra work done on or materials furnished for any such building or structure. Is it possible that if the board should draw a contract settling in advance what the rights of the parties should be as to extras that the statute would make void such timely provisions entered into when the contractor is willing to make fair stipulations in order to get the contract, but that if the contract is silent so that such extras are entirely outside its terms, then the law will raise an obligation? To answer this

question in the affirmative would be to say that the purpose of the law is to prevent express contracts concerning extras and at the same time leave the way open for implied contracts. All the courts say an implied contract cannot be raised against a county where an express contract cannot be made. The law will not imply a contract against the provisions of the statute.

The plaintiff says that section 4073 of the Political Code does not apply to work of this kind because the bridge was constructed between two counties, and cites as authority the case of *Croley v. California Pacific Co.*, 134 Cal. 559. This case does not deal with section 4073 at all, for the very obvious reason that the contract under consideration there was made by the board of supervisors in 1893, long before this section was enacted. That contract was performed and suit thereon was instituted in 1895, but the provisions of section 4073 were not enacted until 1897. It could therefore in no wise affect the rights of the parties in that suit, because it is settled law that the validity of a contract is determined by the law as it stood when made, and the rights of the parties are finally vested and fixed when the performance of the contract is completed. That case decided that subdivision 4 of section 25 of the County Government Act (which is the same as subdivision 4 of section 4041 of the Political Code), requiring contracts to be let to the lowest bidder, did not apply to bridges between counties

because the bridges spoken of in that section were bridges "*within the county*". There is no such limitation in sections 4072 and 4073. These sections say that whenever the board shall enter into a contract for the erection, alteration or repair of *any public building, bridge or structure*, the board shall *in no case* become liable to pay for *any extra work* done on, or *extra materials* furnished for any such building or structure. More sweeping language could not be used.

That case had nothing to do with an implied contract, but dealt with an express contract, which in no sense of the word provided for the construction of a bridge but really purchased the use of a bridge of the railroad company. There is nothing in the case that says that an implied contract would have arisen in the absence of an express contract. No doubt plaintiff's real purpose in citing the case was to argue that since an express contract could be made for the construction of a bridge between counties without advertising for bids, an implied contract could therefore be raised, and that the cases denying the right to hold a county upon *quantum meruit* might thereby be distinguished. Even though it was not necessary to advertise for bids for the construction of the bridge between two counties, there are nevertheless other conditions precedent just as important as advertising for bids, which prevent the raising of an implied contract just as effectually as the provision for bids. Sec-

tion 4073 expressly prohibits the board from paying for work not included in the contract, and also from changing or altering the contract unless the board shall by a vote of two-thirds of their number “*first so order*” and specify the change in writing and agree upon the cost thereof. These are the conditions precedent upon which a contract covering construction not included in the original contract must be made. Can a contract be raised by implication of law when these things are not done? The authorities say no.

In *Fountain v. Sacramento*, 1 Cal. App. 461, plaintiff sued defendant for the value of bricks furnished by him to the city at the request of one of the trustees, which were used by the city in the construction of a wall. But there was no contract made in accordance with the city charter, which provided that “no contract shall be effective unless authorized by vote of the board of trustees”. It was there decided that there could be no implied contract in the face of such a provision, and in so holding the court said:

“The case may appear to justify the doctrine of equitable estoppel. * * * It seems to us, however, that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal boards of trustees to incur liabilities, which have been placed in charters, it will be impossible to bring any such results about if the provisions must give way under all circumstances to the principle upon which equitable estoppels are generally applied. * * * To do this would be to throw

down all the bars that have been raised to protect the people from the consequences of charter violations, and would smoothen the way to dangerous inroads upon the municipal treasuries. There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed,—especially where the loss falls upon one who has knowingly taken upon himself the risk of loss.”

The same thing was held in *Times Publishing Co. v. Weatherby*, 139 Cal. 618, where it was decided that under a charter providing as does section 4073 that there should be no liability unless a contract is made in writing by order of the council, there could be no recovery upon an implied contract where this provision had not been complied with.

So, in *McDonald v. New York*, 68 N. Y. 25; 23 Am. Rep. 144, it was held that no implied contract could be raised against defendant for materials furnished and used by it, in the face of a statute requiring contracts for such materials to be made in writing and recorded.

Likewise, in *Wolcott v. Lawrence County*, 26 Mo. 272, it was held that no implied contract could be raised against a county for the construction of public buildings, because the statute required the county to set aside a fund as a condition precedent to the making of a contract for the construction of a public building.

It must therefore be apparent that whether or not it was necessary to advertise for bids for the construction of the bridge in this case, as a condition precedent to the making of any contract in connection with such construction, there are, nevertheless, various requirements contained in section 4073 which operate to prevent the raising of an implied contract, just as effectually as would the provision requiring bids.

Plaintiff cites the case of *Argenti v. San Francisco*, 16 Cal. 265, and *Contra Costa Water Company v. Breed*, 139 Cal. 432, and *Sacramento County v. Southern Pacific Company*, 127 Cal. 217, as authority for the position that an implied contract can be raised against a county by way of estoppel in this case.

As to the first two cases mentioned, we will again call attention to the fact that the defendant in each of these cases was a municipal corporation, and not a county, and that the liability was incurred in the exercise of corporate municipal powers; wherefore such cases are clearly distinguishable from those involving a county. Municipal corporations are public entities voluntarily organized, and have much more extensive powers than a county, which is merely a political subdivision of the state and is subject to absolutely no liability except such as is imposed by express provisions of the statute.

The last case, however does deal with a county, but there the county was seeking to recover back moneys already paid, and occupied the position of

a plaintiff, which for obvious reasons makes it clearly distinguishable from this case. Where the equitable powers of a court might not upon grounds of estoppel be exercised to restore a county to its original position where it had received the benefits of the work and labor performed, it occupies an altogether different position when it seeks by way of defense to preserve the *status quo*.

Section 2713 of the Political Code must also be reckoned with as preventing the raising of an implied contract. The provisions of that section deal expressly with bridges between counties, and say that

“each of the counties into which any such bridge reaches shall pay such portion of the cost as shall be previously agreed upon by the boards of supervisors of said counties”.

Just as the provisions of section 4073 prevent the raising of a contract by operation of law, so do the express provisions of this section. Each county shall pay the portion of cost *previously* agreed upon by the boards of the two counties. A previous agreement providing for the erection of the bridge is a condition precedent to the power or authority of either or both counties to make a contract for its construction. The law does not apportion the liability of each county, but leaves that to the express agreement of the counties, for the patent reason that the benefits to one county may greatly exceed those to the other. How, then, can the law imply a contract when it cannot fix the liability of either or

both counties, and how can it be said that the law will fix the entire liability upon one county? Because of mistake or warranty? But, as we have already pointed out in section 2 of our brief, if this work was outside the contract there was no mistake or breach of warranty of which plaintiff could complain, for the simple reason that the mistake limited the scope of the contract and thus relieved plaintiff of any liability which the contract might have imposed upon him if there had been no mistake. Even if there was an agreement between the two counties apportioning the cost, under the contract made with plaintiff it could have no application to the \$7000 now sued for if the construction involved was "new and additional work" not required by the contract. This provision of the statute comes clearly within the rule of those cases which prevent a recovery upon either express or implied contract against a county, where it is required to set aside a fund for an expenditure and such action is not taken.

Plaintiff tries to get away from these provisions of the statute and the cases interpreting them, by saying that although this work was outside the contract he was compelled to do it under the contract; that he "either had to do this work or place himself in the position of a defaulter under a contract with the county", and that the work was necessary "in order to save the contract" (reply brief, pages 17, 23), and that therefore these cases are not applicable.

If this work was not called for by the contract, plaintiff was not bound to do it, for nothing else bound him to work for the county. If the contract did not require the work, it was plaintiff's duty to stop when he had excavated to the point required by the contract and demand that defendant put the premises in such condition as would permit him to proceed with the performance of his agreement. In the absence of stipulation, as in this case, there is no law which compels one party to a contract to perform the pre-requisite obligations undertaken by the other party, and after having done so, to proceed with the performance of his own side of the agreement. Nor is this all. If one party should enter into a contract with another to construct a building upon certain foundations, and the other party had expressly agreed to furnish such foundations, and failed to do so, the first party would not even be authorized, much less compelled, to provide the foundations and then perform, because the law gives the second party the alternative of either performing his contract or breaching it and paying damages. There is no law which authorizes or compels one party to perform the contract of another, when the latter is permitted by law either to perform or breach.

The law imposes upon plaintiff knowledge and notice of the limitations of the county's contractual powers. If this work was outside the contract and the county was bound to make good the statement as to the length of the pier, it was not plaintiff's busi-

ness to come forward and do it for the county; it was his duty to call defendant's attention to the mistake and permit it to make a contract in compliance with the statute for the performance of that portion of the work not covered by the contract, or to alter the original contract in the manner provided by law so as to cover the construction in dispute. And if, as plaintiff says, this contract bound the county to make good its representations in the plans, and the county had refused to do so, he would have had his remedy upon an express contract, legally entered into, for the damages necessary to make him whole. Why, then, was not plaintiff just as free an agent in the performance of the construction below the point indicated on the drawings, as was any one of the plaintiffs in the cases above cited?

For these reasons, in addition to those stated in our brief, we think the order of the lower court granting a nonsuit should be affirmed.

WALTER SHELTON,
For Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

F. W. FICKETT,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the First Judicial
District of the Territory of Arizona to the Supreme
Court of the Territory of Arizona, Transferred to
the United States Circuit Court of Appeals for
the Ninth Circuit Under Section 33 of the
Act of Congress Approved June 20,
1910 (36 Stat. 557,577), and
Pursuant to Order Entered
April 1, 1912, by Said
Circuit Court of
Appeals.

No. 2127

United States
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UNITED STATES OF AMERICA,

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VS.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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No. C-2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Minute Entry of October 23, 1911—[Re Indictment].

Come now the grand jury aforesaid, and report a true bill of indictment against the defendant herein, charging him with the crime of interrupting and hindering by threats and by force the surveying of public lands of the United States, by a person authorized to survey the same by the Commissioner of the General Land Office of the United States.

*In the District Court of the First Judicial District
of the Territory of Arizona.*

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT.

Indictment.

In the District Court of the First Judicial District of the Territory of Arizona, the 23d day of October, one thousand nine hundred and eleven.

F. W. Fickett is accused by the Grand Jury of the United States of America, chosen, selected and

sworn within and for the First Judicial District of the Territory of Arizona, in the name and by the authority of the United States of [1*] America, by this indictment of the crime of interrupting, hindering and preventing by threats and by force the surveying of public lands of the United States, by a person authorized to survey the same by the Commissioner of the General Land Office of the United States, committed as follows: That the said F. W. Fickett, late of the First Judicial District aforesaid, heretofore, to wit: On or about the thirtieth day of August, A. D. one thousand nine hundred and eleven and within the First Judicial District of the Territory of Arizona, and within the county of Pima, in said Territory of Arizona, did unlawfully, willfully and feloniously by threats and by force, on the part of him the said defendant, F. W. Fickett, interrupt, hinder and prevent one Paul E. Fernald from making a survey of public lands of the United States of America, to wit: five certain unpatented mining claims, which said unpatented mining claims were then and there claimed and owned by Old Pueblo Copper Company, a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and known and described as follows, to wit: Little Betsy, Battle Axe, Quien Sabe, Quien Sabe No. 2 and Marion Mining Claims, which said mining claims are situate and being in the Amole Mining District, Pima County, Arizona Territory, he the said Paul E. Fernald being then and there a person authorized

*Page-number appearing at foot of page of original certified Record.

to survey the said public lands in conformity with instructions of the Commissioner of the General Land Office of the United States of America.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said F. W. Fickett, in the manner [2] and form aforesaid, and at the time and place aforesaid, did then and there commit the crime of interrupting, hindering and preventing by threats and force the survey of public lands of the United States by a person authorized to survey the same by the Commissioner of the General Land Office of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. E. MORRISON,

United States Attorney for the Territory of Arizona.

[Endorsements]: No. C-2306. In the District Court, First Judicial District Territory of Arizona. United States of America vs. F. W. Fickett. Indictment. A True Bill, F. L. Ewing, Foreman of the Grand Jury. Indictment No. ——. Witnesses examined before the Grand Jury: Paul E. Fernald. Presented to the Court in the presence of the Grand Jury by their foreman, and filed this 23d day of October, 1911. Allan B. Jaynes, Clerk.

Demurrer to Indictment.

*In the District Court of the First Judicial District
of the Territory of Arizona.*

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

F. W. FICKETT,

Defendant. [3]

DEMURRER.

Comes now the defendant, F. W. Fickett, and demurs to the indictment heretofore found against him on the 23d day of October, 1911, in said court, and for ground of demurrer says: That it appears upon the face of said indictment that the facts stated therein do not constitute a public offense against the United States of America, or at all.

WHEREFORE, defendant prays that this, his demurrer, be allowed and sustained, and that he be discharged, and for all proper orders and relief.

S. L. KINGAN,

Attorney for Defendant.

[Endorsements]: C-2306. In the District Court Arizona. United States of America, Plaintiff, vs. Arizona. United States of America, Plaintiff vs. F. W. Fickett, Defendant. Demurrer. Reed. copy

this 24th day of October, 1911. J. C. Forest, Asst.
U. S. Atty. Filed Oct. 24, 1911. Allan B. Jaynes,
Clerk.

No. C-2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

**Minute Entry of October 24, 1911—[Re Arraign-
ment, Demurrer, Dismissal, etc.].**

The United States Attorney being present, comes now the defendant herein, in person and with his counsel, S. L. Kingan, Esq., into open court, and upon being arraigned at the bar of this court upon the indictment herein, and said indictment being read to him, a copy whereof, with the [4] endorsements thereon, is handed to said defendant, who states that his true name is as set out in said indictment. And now, upon being called upon to answer thereto, said defendant filed a demurrer to the indictment. Argument of the respective counsel was had and the matter being fully submitted to the Court and the Court being fully advised in the premises, does sustain said demurrer. It is further ordered that this case be dismissed and that the defendant be discharged.

No. C-2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Minute Entry of October 25, 1911—[Notice of Appeal to Supreme Court of Territory of Arizona].

Comes now J. E. Morrison, Esq., United States Attorney, and gives notice of appeal from the order sustaining the demurrer to the indictment herein, to the Supreme Court of this Territory.

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Prayer for Appeal.

Comes now the United States of America, by Joseph E. Morrison, its attorney for the Territory of Arizona, and prays that an appeal to the Supreme Court of the Territory of Arizona be allowed and granted [5] by this Honorable Court from the judgment of said court in the above-entitled cause sustaining a demurrer to the indictment herein, ordering the dismissal of said indictment and the discharge of the defendant.

J. E. MORRISON,
United States Attorney for the Territory of Arizona.

[Endorsements]: No. C-2306. In the District Court of the First Judicial District of the Territory of Arizona. United States of America vs. F. W. Fickett. Prayer for Appeal. Filed Dec. 26, 1911. Allan B. Jaynes, Clerk.

**[Motion for Extension of Time to Prepare Record,
Bill of Exceptions, etc.]**

*In the District Court of the First Judicial District of
the Territory of Arizona.*

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT.

Comes now the United States of America, by its attorney for the Territory of Arizona and moves the Court that the plaintiff, the United States of America, be granted sixty days from the date of the filing hereof, within which to prepare transcript of record, bill of exceptions and statement of facts in the above-entitled cause. [6]

J. E. MORRISON,

United States Attorney for the Territory of
Arizona.

[Endorsements]: No. C-2306. In the District Court of the First Judicial District of the Territory of Arizona. United States of America vs. F. W.

Fickett. Motion for Time to Prepare Transcript.
Filed December 26, 1911. Allan B. Jaynes, Clerk.

**[Order Allowing Appeal to Supreme Court of
Territory of Arizona.]**

FIRST MINUTE ENTRY OF DECEMBER 26,
1911.

No. C-2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Comes now the United States of America by Joseph E. Morrison, its attorney for the Territory of Arizona, and prays that an appeal to the Supreme Court of the Territory of Arizona, be allowed and granted by this Honorable Court from the Judgment of said Court in the above-entitled cause sustaining a demurrer to the indictment herein, ordering the dismissal of said indictment and the discharge of the defendant. It is therefore ordered that said appeal be granted and notice of appeal entered.

**[Order Granting Sixty Days from December 26, 1911,
in Which to Prepare Transcript.]**

**SECOND MINUTE ENTRY OF DECEMBER 26,
1911.**

No. C-2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

It is ordered that the United States of America be granted sixty days from this date in which to prepare a transcript herein. [7]

**[Certificate of Clerk, District Court, First Judicial
District, Territory of Arizona, to Record.]**

United States of America,
Territory of Arizona,
First Judicial District,—ss.

I, Allan B. Jaynes, Clerk of the District Court of the First Judicial District of the Territory of Arizona, do hereby certify that the above and foregoing seven (7) pages of typewritten matter constitutes a true, perfect and complete transcript of the Record in the case of the United States of America vs. F. W. Fickett, Defendant, No. C-2306, in said court, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 9th day of January, 1912.

[Seal]

ALLAN B. JAYNES,
Clerk as Aforesaid. [8]

[Endorsed]: No. 2127. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. F. W. Fickett, Appellee. Transcript of Record. Upon Appeal from the District Court of the First Judicial District of the Territory of Arizona to the Supreme Court of the Territory of Arizona. Transferred to the United States Circuit Court of Appeals for the Ninth Circuit Under Section 33 of the Act of Congress, Approved June 20, 1910 (36 Stat. 557, 577), and Pursuant to Order Entered April 1, 1912, by said Circuit Court of Appeals.

Received April 5, 1912.

F. D. MONCKTON,
Clerk.

Filed April 15, 1912.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth
Circuit.

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

—VS—

F. W. FICKETT,

Appellee.

} BRIEF OF APPELLANT

STATEMENT OF CASE

As appears from the transcript of the record filed herein, F. W. Fickett was indicted on 23rd day of October, 1911, by the Grand Jury of the United States of America, chosen, selected and sworn within and for the First Judicial District of the Territory of Arizona, for the crime of unlawfully interrupting, hindering and preventing by threats and by force the surveying of public lands of the United States, by a person authorized to

survey the same by the Commissioner of the General Land Office of the United States. [pp. 1, 2, 3, T. of R.]. The portion of the indictment specifically charging the crime, which, in our judgment, is all that will be necessary for the Court to consider, is as follows:

“That the said F. W. Fickett, late of the First Judicial District aforesaid, heretofore, to wit: On or about the thirtieth day of August, A. D. one thousand nine hundred and eleven and within the First Judicial District of the Territory of Arizona, and within the county of Pima, in said Territory of Arizona, did unlawfully, wilfully and feloniously by threats and by force, on the part of him the said defendant, F. W. Fickett, interrupt, hinder and prevent one Paul E. Fernald from making a survey of public lands of the United States of America, to wit: five certain unpatented mining claims, which said unpatented mining claims were then and there claimed and owned by Old Pueblo Copper Company, a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and known and described as follows, to wit: Little Betsy, Battle Axe, Quien Sabe, Quien Sabe No. 2 and Marion Mining Claims, which said mining claims are situate and being in the Amole Mining District, Pima County, Arizona Territory, he the said Paul E. Fernald being then and there a person authorized to survey the said public lands in conformity with instructions of the Com-

missioner of the General Land Office of the United States of America.”

(T. of R. p. 2).

On October 24, 1911, the defendant appeared in open court, and after arraignment, filed demurrer to the indictment. The demurrer was substantially in the following language:

“That it appears on the face of said indictment that the facts stated therein do not constitute a public offense against the United States of America, or at all.”

(T. of R. p. 4).

On the said 24th day of October, 1911, argument having been made by the respective counsel, and the demurrer being submitted, the court made and entered its judgment sustaining said demurrer, dismissing the case, and ordering that the defendant be discharged. (T. of R. p. 5). On the 26th day of December, 1911, said date being within the same term of court during which the aforesaid judgment was entered, J. E. Morrison, United States Attorney for the Territory of Arizona, prayed an appeal to the Supreme Court of the Territory of Arizona, from the said judgment, (T. of R. pp. 5 and 6), which said prayer for appeal was allowed and granted by the Court on the same date, (T. of R. p. 7), and the United States of America was granted sixty days from said December 26, 1911, within which to prepare transcript of the record, in accordance with the statute in such case made and provided. [T. of R. p. 7].

ASSIGNMENTS OF ERROR

Assignment of Error 1.

The court erred, in sustaining the demurrer to the indictment, because the said indictment does state facts sufficient to constitute a public offense against the United States of America, whereas the Court held that it did not state facts sufficient to constitute any offense.

ARGUMENT

The indictment in this case was drawn under Section 2412 of the Revised Statutes of the United States, which is as follows:

“Every person who in any manner, by threats or force, interrupts, hinders, or prevents the surveying of the public lands, or of any private land-claim which has been or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the Commissioner of the General Land Office, shall be fined not less than fifty dollars nor more than three thousand dollars, and shall be imprisoned not less than one nor more than three years.”

The indictment charges, in the language of the statute, that the defendant and appellee did violate the provisions of said Section 2412. The

offense being purely a statutory one, the charging of the same in the language of the statute is sufficient. This proposition of law is so well settled that we do not think it necessary to cite authorities.

The judgment of the lower court should be reversed, and the case remanded with instructions to overrule the demurrer and proceed in the case as the law provides.

Respectfully submitted,

J. E. MORRISON,
UNITED STATES ATTORNEY.

J. C. FOREST,
ASS'T. UNITED STATES ATTORNEY.

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

—VS—

F. W. FICKETT,

Appellee.

BRIEF OF APPELLEE

F. W. Fickett was indicted for interrupting, hindering and preventing one Fernald from making a survey of five certain unpatented mining claims, claimed and owned by the Old Pueblo Copper Company, a corporation, the said Fernald being a person authorized to survey public lands, in conformity with instructions of the Commissioner of the General Land Office.

The indictment was demurred to on the ground that it did not charge an offense, and the demurrer was sustained.

The indictment was drawn under Section 2412 of the Revised Statutes of the United States:

“Every person who in any manner, by threats or force, interrupts, hinders or prevents the surveying of the public lands, or any private land claim which has or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the

Commissioner of the General Land Office, shall be fined not less than fifty dollars nor more than three thousand dollars, and shall be imprisoned not less than one nor more than three years."

This statute interdicts the doing of two things:

1. Interrupting, hindering or preventing the survey of the public lands.

2. Interrupting, hindering or preventing the survey of private land claims which have been, or may be confirmed by the United States.

It will be conceded, we believe, at the outset, that a mining claim or location, is not a "private land claim," which has or may be confirmed, within the statute. Private land claims which have or may be confirmed by the United States, are a distinct and well known class of property, and have never, so far as we know, been held to include mining claims located under the mineral laws, and the fee to which is obtained by patent, and not confirmation. There is a wide distinction between a "private land claim," and a claim to lands, either private or public. Besides the indictment only refers to public lands.

The question is narrowed therefore to hindering, etc., the survey of the public lands, and whether or not a mining claim is public land. This, indeed, is the whole matter. The appellee is charged with hindering, preventing and interrupting one Fernald, he being a person authorized to survey public lands, (said Fernald being a deputy mineral surveyor), in the survey of unpatented mining claims, *claimed and owned* by the Old Pueblo Copper Company. If these mining claims are public lands the appellee would come within the statute; if they are not public lands, he would not.

Is then, a mining claim, located and held under the min-

eral laws, "public land," and within the fair meaning of the statute?

The indictment on its face is somewhat anomolous. Fickett is charged with interrupting the survey of public lands, and then it is recited that these lands are mining claims, and that they are claimed *and owned* by a private corporation. Can it be that property that has been granted by the United States, and is owned in private, is public land?

Public lands are lands of the United States to which no claim or right of another has attached. So soon as a private claim or right has attached to public lands such lands are no longer public, but are segregated, and in their nature private.

"And by public land, as it has long been settled, is meant such land as is open to sale or other disposition under the general laws. All lands to which any claims or rights of others have attached do not fall within the designation of public lands."

Bardon vs. Northern Pacific Railroad Co., 145 U. S., page 538.

"In Willcox vs. Jackson, 13 Peters, 498, 513, this court held that whenever a tract of land has been legally appropriated for any purpose, from that moment it becomes severed from the mass of public lands and no subsequent law or proclamation or sale will be construed to embrace it or to operate upon it, although no reservation of it be made. The validity and effect of the appropriation do not depend upon its being subjected afterwards to cancellation because of omission of some particular duty of the party claiming its benefit.

"In Witherspoon vs. Duncan, 4 Wallace, 210, 218, this court held that if a party entitled by law to enter land at the Land Office does so, when the certificate of entry is given to him a contract is ex-

ecuted between him and the Government, and thereafter the land ceases to be a part of the public domain." *Ib.*

Many other authorities might be cited to substantiate this proposition.

The grant by the United States to the locator of a mining claim under the mineral laws is of a much higher character than any rights given under either the preemption or homestead laws. By the preemption laws the United States simply declares that in case any of the lands were thrown open for sale the privilege to purchase would be first given to parties who had settled upon and improved them. No estate in the land was acquired by the claimant until the amount of purchase money was actually paid. The same doctrine applies to homestead claims. With reference to mineral lands the United States has declared that they are free and open to exploration and purchase, and a positive compact is made between the Government and the locator whereby the latter is clothed with the *exclusive* right of possession and enjoyment.

Lindley on Mines, Vol. 1, page 898, 2nd Ed.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.

Forbes vs. Gracey, 94 U. S., page 767.

Gillis vs. Downey, 85 Fed., page 488.

"There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked these boundaries by stakes so that they could be readily

traced; they posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of and exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditure of a specified amount in developing it. Until the patent issued the Government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale."

Noyes vs. Mantle, 127 U. S., page 351.

"Where there is a valid location of a mining claim the area becomes segregated from the public domain, and the property of the locator."

St. Louis Mining Company vs. Montana Mining Company, 171 U. S., page 655.

It would be difficult in the light of these authorities to declare that property which has been segregated from the public domain and from the public lands, and which has been expressly granted to a citizen is still public land. As between the Government and the locator there is a statutory conveyance; the locator is a purchaser. The Government may no more interfere with his private property than could a citizen. The Government itself has taken the land conveyed by it from its public lands, and made it private land.

But it may be urged that the land remains public as against the Government notwithstanding the fact of conveyance, for the reason that before the owner may obtain patent it is necessary that the outline, or lines, of the owner's private property be surveyed by an officer of the government. Of course the owner of a mining claim never

need patent it. In case he never does, then what is his mine, public land, or private property? If he does decide to obtain a patent, how does this in any way effect his title? It is whether private rights have vested that determines whether land is public or private, and not whether the lines and boundaries of the land have been officially fixed. If the title be in the Government without the attachment of private rights, then the land is public. If a private right has attached, it is private. How could the applying for a patent or for a survey change the title or in any way effect its character? The actual issuance of the patent merely conveys the fee; the beneficial title, and the real title for all substantial purposes, has been previously granted.

And the Government has required that its own officers survey mining claims,—why? Not because they are public lands, but because they are segregated out of public lands, and the Government wants a record made by its own officers, to check off the lands. The Government merely wants to, and does, measure out, as it were, the property of which it has disposed.

Because the Government, having sold a locator a mining claim, reserves the right to measure the land sold, does not make the lands public lands. It is a paradox to say that the Government having granted land, that the land is still public for any purpose. Nor can there be any merit in the assertion that because in the survey of a mining claim the public lands adjoining it are incidentally, and in part surveyed, that such is a survey of public lands, for the reason that it is the mining claim that is surveyed. There may or may not be public land adjoining a mining claim, and in any event, as before stated, it is the mining claim that is to be surveyed, and not the surrounding country.

Consider where the theory of the law as evidenced in this indictment would lead: "A" owns a mining claim; it is his.

He decides to have it surveyed for patent, and he makes a contract with a deputy mineral surveyor. "A" is to pay this surveyor. After he has applied for the survey, and it is ordered, no difference what his financial or other condition might be, "A" could not stop the survey, and if he did in any way attempt to stop the deputy from surveying his ground, he would be guilty of a felony. If "A," after asking for a survey, should find that his property is not what he thought it was; if he found that what he thought was a mine, was only a hole in the ground and worthless, and if he should attempt to stop the survey, and save further expense, he would be guilty of a felony. And although it is not, of course, in the record here, I cannot refrain from setting out a few facts in the present case: As alleged in the indictment the Old Pueblo Copper Company owns the mining claims in question. Mr. Fickett was the General Manager of this company, and one of its largest stockholders, and he did not want the ground surveyed for patent at the time, for weighty reasons, and endeavored to stop the survey. To send a man to the penitentiary for such an action, and under the statute here invoked, would indeed be going very far.

This statute was enacted in 1830, long before the mineral resources of the West were dreamed of, or the mining laws enacted. It was meant to apply to the public lands,—lands owned and controlled by the United States alone, and to which no private rights had attached. It has no application to the survey of private lands such as mining claims.

The mining claims then, the survey of which the appellee is charged with interrupting, were private lands; they were lands owned by the Old Pueblo Copper Company; they were not public lands in any sense of the term; they were owned in private, the mere naked fee being held in trust by the United States.

The judgment of the lower court, therefore, in sustaining the demurrer should be affirmed.

Respectfully submitted,

S. L. KINGAN,
Attorney for Appellee.

United States Circuit Court of Appeals For the Ninth Circuit

United States of America,
Appellant.

vs

F. W. Fickett,

Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

It is, of course, conceded that a mining claim is not a private land claim within the meaning of that expression as used in Section 2412 Revised Statutes of the United States, under which the prosecution in this case was initiated.

The appellee in his brief states that the language of the indictment is somewhat anomalous, in that it is charged that Fickett interrupted the survey of the public lands, which said lands were, then and there, mining claims and were claimed and *owned* by a private corporation. The question is then asked: "Can it be that property that has been granted by the United States and is owned in private is public land?" It is perfectly apparent from the language of this indictment, wherein it charges that the lands in question were unpatented mining claims, that the govern-

ment had not *granted* the said lands. ... We fail to see wherein the language is anomalous, as unpatented mining claims are most certainly claimed and owned, in so far as it is possible for private citizens or corporations to *own* the same, until patent from the United States be issued to the claimant or *owner* of the unpatented mining claim. The title to an unpatented mining claim is very different from the title to a patented mining claim. It is perfectly true that the locator of an unpatented mining claim and his assigns and successors hold a certain title, which is much greater in its scope than the right which is conferred by the United States upon the pre-emptor or the claimant under the homestead or desert land laws. It is also true that unpatented mining claims may be deeded, mortgaged, hypothecated, and are the subject of descent, but it is equally certain that during all the period while a valid mining claim remains unpatented, the paramount title, the fee, remains in the United States of America. Were this not the fact, the government would have nothing to convey and grant by its patent. This, of course, is so clear that we doubt if anyone would care to dispute it, although the appellee in his brief contends that the indictment, by its language, shows that the lands have been *granted* by the United States.

The question in this case is, as the brief of appellee states:

"Is an unpatented mining claim, located and held under the United States mineral laws, public land within the meaning of the statute?"

The law, which is a United States statute enacted by the lawmaking power of the government itself, provides, in brief, that every person who in any manner, by threats or force, interrupts, hinders or prevents the surveying of the public lands * * * by the persons authorized to survey the same *in conformity with the instructions of the Commissioner of the General Land Office, shall be fined. * * **

An examination of the authorities cited by the appellee to support his contention that the mere location of a mining claim segregates it from the public domain and causes it immediately to cease to be a part of the public lands of the United States, discloses the fact that each of said cases were actions between private individuals or corporations. Of course, it is not contended that the location of a valid mining claim does not segregate the land within its boundaries from the public domain so far as anyone but the United States, the owner paramount of the land itself, is concerned. We have, without success, diligently searched the books to discover a single case wherein it has even been suggested that the segregation of land referred to in the cases cited by appellee covered the condition existing between the claimant of the public lands and the United States itself. It will not be disputed that the location of a valid mining claim gives the locator the entire right of possession, even as against the government itself, as long as the locator and his successors and assigns comply with the laws of the United States and the regulations of the Department of the Interior and General Land Office pertinent to such matters, and no longer. However, this position does not affect the point at issue in this case. Thus far, we believe, there is no difference of opinion between the appellee and the United States. The real point brought here for determination is whether or not:

as between the locator of an unpatented mining claim and the United States of America the lands within the unpatented mining claim are public lands of the United States.

We contend that they are, and if so the demurrer in the court below should have been overruled. That the paramount title to the land embraced within the lines of unpatented mining claims is in the United States is specifically declared by Section 910 Revised Statutes of the United States, which is substantially as follows:

"That no possessory action between individuals * * * shall be affected by the *fact* that the *paramount title* to the land on which said mines are is in the United States * * *."

Quoting from the decision so strongly urged by the appellee, (*Forbes vs. Gracey*, 94 U. S. 762, 24 Law Ed. 313), it appears that the United States Supreme Court has specifically held that the real title in fee remains in the United States until patent is issued. The selling, encumbering and otherwise disposing of unpatented mining claims cannot and does not in any way affect or encumber the title of the United States, for, no matter what transfers, or encumbrances, or other disposition of lands within an unpatented mining claim have been made, the moment that the title which the locator secures by virtue of his location lapses and becomes forfeited, all such encumbrances, and transfers are, in law, dead and of no effect whatsoever, for they but affected the right which the locator had under the laws of the United States. The fee to the lands remains in the government until granted by its patent, and no act of the locator, or of those holding under him, or in succession, can in any way affect the paramount title so held by the United States.

"These claims may be sold, transferred, mortgaged and inherited *without infringing the title of the United States*."

Forbes vs. Gracey, Id.

The Supreme Court of California, in discussing the character of the right or title held by the locator of an unpatented mining claim, says:

"Although the *ultimate fee* in our public mineral lands is *vested* in the *United States*, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee and as a distinct vested right of property in the

claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons *but the United States*, as the owners of the land and mines therein."

Hughes vs. Devlin, 23 Calif. 502;

Watts vs. White, 13 Calif. 321.

"Prior to the issuance of a patent the locator cannot be said to own the fee simple title. The fee resides in the general government, whose tribunals, specially charged with the ultimate conveyance of the title, must pass upon the qualifications of the locator and *his compliance with the law*. Yet, as between the locator and every one else *save the paramount proprietor* the estate acquired by a perfected mining location possesses all the attributes of a title in fee, * * *. As between the locator and the government, the former is the owner of the beneficial estate, and the *latter holds the fee in trust*, to be conveyed to such beneficial owner upon his application in that behalf and *in compliance with the terms prescribed by the paramount proprietor*."

Vol. 1 Lindley on Mines, 892.

Noyes vs. Mantle, 127 U. S. 348, 32 Law Ed. 168;

Dahl vs. Raunheim, 132 U. S. 260, 33 Law Ed. 324.

And it is only when a claimant has complied with all the proceedings *essential for the issue of patent* that he becomes the equitable owner of the mining ground.

Dahl vs. Raunheim. Id.

A reading of the above cited authorities shows that both the courts and the text writers, in defining the right, interest or title of the owner of a valid unpatented mining claim, are always careful to say that the paramount title

is in the government, and that, while the claimant may do almost everything with an unpatented mining claim that he could with property to which he held the fee, such transactions are but good between himself and individuals and corporations other than the government.

It is, therefore, apparent that the law is, and while there appears to be no express ruling on the subject, has been carefully, by implication, held to be that, as between the claimant and the government, the lands remain public lands of the United States until the issuance of patent. This must surely be so, for, under the general land and mineral laws of the United States, it is absolutely impossible for the government to convey anything but its public lands.

The statute under which this prosecution is pending provides that it is an offense to hinder the surveying of the public lands by the persons authorized to survey the same. *in conformity with the instructions of the Commissioner of the General Land Office.* It is provided by Section 2325 Revised Statutes of the United States, substantially, that a patent for a mining claim may be obtained by following the provisions of said section, among which is the following:

"Any person * * * having claimed and located a piece of land for such purposes (mineral purposes) may file * * *, in the proper land office, an application for a patent, under oath, * * * together with a plat and field notes of the claim or claims in common, made by and under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims * * *."

It is required by the regulations of the General Land Office that a survey of such claim shall be made, and that the plat thereof shall be filed in the proper land office, as required by the above cited section. It is thus found that the United States, notwithstanding the fact that it has given certain rights of quite an extensive character to locators of mining claims, still, in its statute, asserts as one of the conditions precedent to a patent that the Surveyor General

of the *United States* shall cause a survey to be made of the unpatented mining claim, and that the Commissioner of the General Land Office, acting as is his duty within and by the requirements of the above cited statutes, requires such survey to be made and the plat thereof to be filed in the proper land office. It appears to us that nothing could be more clear than that the land embraced within an unpatented mining claim is still the public land of the United States, otherwise the government would have no authority whatsoever to order, as a condition precedent to patent, that a survey, by its own Surveyor General, be made of the ground. The right of the United States to legislate and of its officer, the Commissioner of the General Land Office, to promulgate such regulations has never been, and, in our humble judgment, never can be questioned. Surveyor generals are officers of the General Land Office and fulfill their duties under the direction of the Commissioner of that office. Therefore, Congress having specifically required that this survey shall be made by the Surveyor General of the proper district, and such survey being also required by the regulations of the Commissioner of the General Land Office, it is perfectly clear that Section 2412 referred to all lands which might lawfully be surveyed by persons authorized to survey the same under the instructions of the Commissioner of the General Land Office, which is in exact accord with the language used in Section 2412.

The appellee contends that it is a paradox to say that, the government having *granted* land, the land is still public for any purpose. It has, we believe, herein been clearly shown herein that the government does not *grant* the land until it issues its patent. The argument of the learned counsel for the appellee is, therefore, in this particular, based upon an erroneous premise.

The reference made by the appellee to what might later appear to be the actual facts in the case has no place in this argument.

It is true that the statute under construction was enacted in 1830, but it must be recalled that the statutes of the United States were revised and the revision adopted in 1877, which was about five years after the passage of the Act of May 10, 1872, which latter act was the inception of the present mining laws of the United States, and which was incorporated, practically as it stood on the day of its adoption, into the revision of 1877. We think it quite apparent that it was intended that the statute under which this prosecution was commenced, having been included in the said revision and referring to all public lands, surveys of which might be lawfully made by officers of the government under the regulations of the Commissioner of the General Land Office, was intended to apply to the survey of unpatented mining claims.

Were it not the law that anyone interfering with a United States Mineral Surveyor, engaged in his duty and under the instructions of the general Land Office in surveying unpatented mining claims, should be guilty of an offense, the owner of an unpatented mining claim might never be permitted to go to patent, for anyone, interested or not, might, by force and threats, prevent any such Mineral Surveyor from making such survey. The object of the law is certainly a most praiseworthy one, and, should this Court hold that Section 2412 is not applicable, it leaves mineral surveyors and claimants of unpatented mining claims, desiring surveys for patent to be made, in a most unfortunate position.

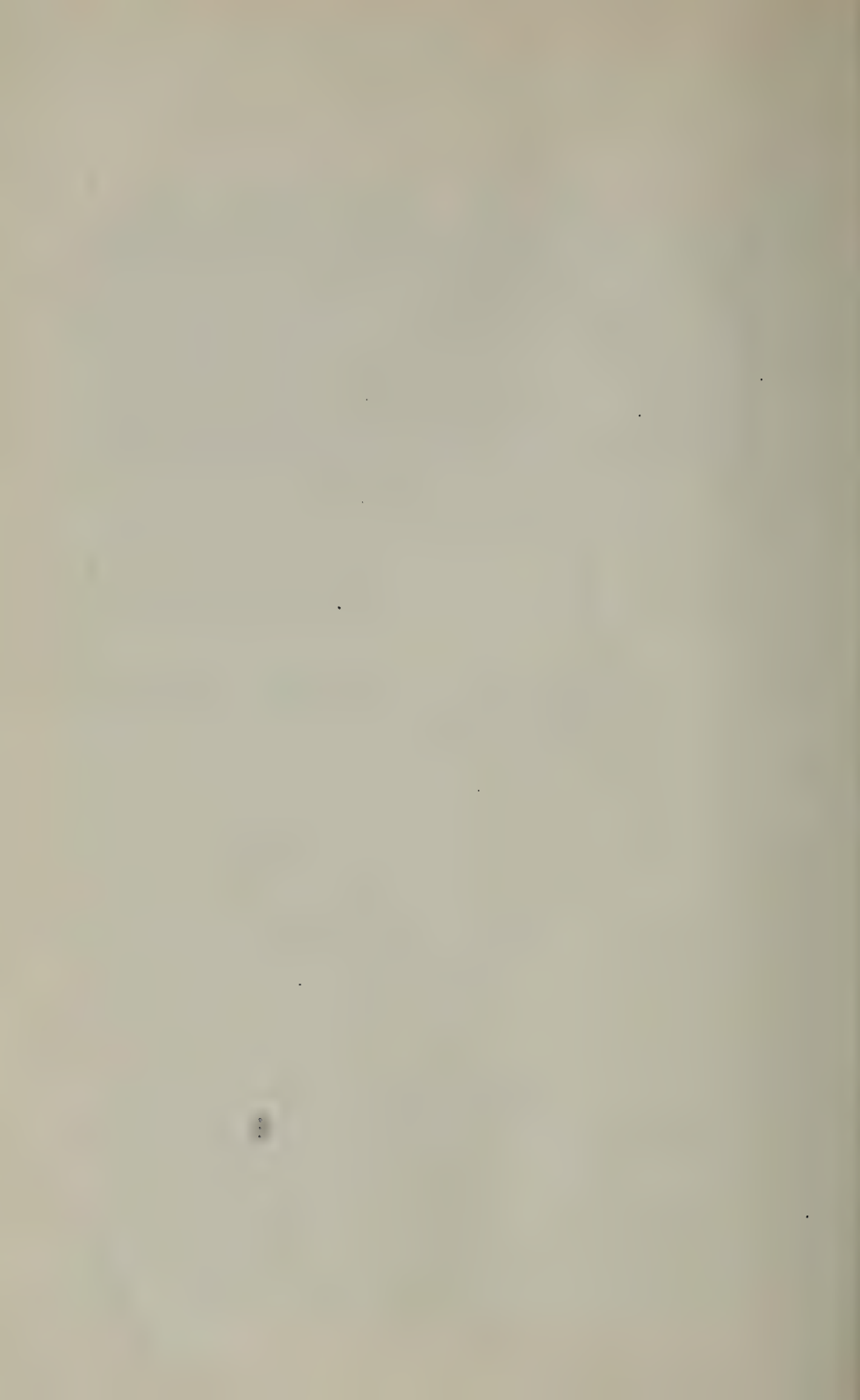
In short, the contention of the appellant is that the lands within an unpatented mining claim are public lands within the meaning of Section 2412, because the paramount title remains in the government until the issuance of the patent; because the statutes of the United States expressly declare, as a condition precedent, that survey of such claims shall be made by and under the direction of the Surveyor General of the United States for the proper district; because the Commissioner of the General Land Office in his regula-

tions touching this subject requires, as he is by law compelled to do, a survey by said Surveyor General of said lands, thus bringing the lands within the exact language of the statute in question; because no court has ever yet held or suggested that unpatented mining claims, as between the claimant and the government, are not public lands; because, were said unpatented mining claims not public lands as between the claimant and the government, the United States could not, under the general land and mineral laws, convey such lands by patent.

Respectfully submitted,

J. E. MORRISON,
United States Attorney for the District of Arizona.

J. C. FOREST,
Asst. United States Attorney for the District of Arizona.



United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

—VS.—

F. W. FICKETT,

Appellee.

Appellee's Reply to
the Reply Brief of
Appellant.

For the reason that the appellant in its first brief did not state its case, but left the appellee uncertain as to what points it would rely upon, we feel that we have a right to reply to the reply brief of appellant. Appellant in its reply brief for the first time sets up its contentions, and were we not allowed a reply to these contentions we would be deprived, it seems to us, of a substantial right.

Appellant contends that the United States does not make a grant to the locator of a mining claim, and thence argues that the use of the word *owned* in the indictment, wherein it is averred that the unpatented mining claims in question are owned by a private corporation, does not imply a grant. As all unpatented mining claims belonged originally to the United States it is difficult to perceive how a locator could own an unpatented mining claim unless the United States, the original owner, granted to the locator something in the

way of title. To say that the lands all belong to the United States and are public lands, in the first place, and then to state that the locator owns the lands, and to claim in the face of these facts that there has been no grant from the original owner to the locator, is hardly logical.

The public mineral lands of the United States are open to sale and purchase, and when a locator makes a valid location he purchases the land and is a grantee of the United States, of such land. This is in no manner affected by the reservation of the fee by the United States, the Government merely holding such fee in trust. Originally the Government owned all the title,—the fee and the beneficial estate. When a mining claim is located the whole of the beneficial estate is granted, and the fee is merely held in trust, and this fee *must* be conveyed by the trustee to the beneficiary, without choice or discretion, when the beneficiary complies with the conditions prescribed by the statute, or, in other words, the terms of the trust. There is a grant then, and a grant of the real, substantial title,—the only thing reserved being the naked fee. Appellant was quite correct, therefore, in its indictment, to state that the unpatented mining claims were owned even against the Government itself, by the private corporation mentioned in the indictment.

It appears to us, with all respect for counsel upon the other side, that a confusion exists in his argument, in this: It is stated that the paramount title of the land itself remains in the United States, and that because the paramount title is in the United States it must follow that the lands are public lands. It appears to us that the paramount title has nothing to do with the matter, whether the lands are public or not.

What are the relations between the locator and the Government? The Government is a vendor offering its property for sale upon certain conditions. When the first pay-

ment is made, that is to say, when the Statute in regard to the location of mining claims, is complied with, the Government agrees to, and does vest in the locator or purchaser the whole of the beneficial title to the land. A conveyance of this title is actually then made by virtue of the Statute. The relation of vendor and vendee then and there exists,—the purchaser is clothed with rights of purchase as against the Government itself, and the Government cannot divest these rights. The naked legal fee is held by the vendor, and how is it held? The vendor is a trustee of the vendee, and holds the title for the use and benefit of the vendee, and must convey it upon the vendee's request, and his performance of the statutory requirements. We thus have land actually sold and conveyed, save and except that the fee is held in trust and held in trust for the sole use and benefit of the vendee.

The question is: Are lands which have thus been sold by the Government public lands? And not whether the fee is held in trust by the Government. With the definitions of public lands before us it is difficult to see how the United States can claim, as between itself and the purchaser, that it has granted the land and merely holds the fee in trust, and yet that the lands are public lands. They are certainly not open to sale or disposal, and why? Because they have already been sold. Can it be seriously urged that the Government can take the position that it has sold lands, and yet, as between it and its own vendee, the lands are public, merely because the Government holds the fee in trust and for the sole use and benefit of its vendee?

The quotations made by appellant, namely, from *Hughes vs. Devlin*, 23 California, 502, and *Watts vs. White*, 13 California, 321, merely show or aver the familiar doctrine that as between all persons except the United States the title granted by the Government to the locator is treated as a fee simple title, and of the same effect is the quotation from

Lindley, Volume 1, page 892. As between the Government and the locator, as said by Mr. Lindley, and by the courts, the relation is that of trustee and *cestui que* trust.

How is this relation brought about? If there was no grant, and if the lands were still public, how could a person who owns the whole title, legal and equitable, become the mere trustee of the naked title, unless that owner who first held all, had granted everything but the naked legal fee, and merely held that in the capacity of trustee? Of course there must have been a grant, and a grant of everything, save and except the naked fee, and if there was a grant, there must have been a purchaser, and that purchaser must have acquired everything but the one thing reserved, namely, the naked fee. It can hardly be said then, that lands which were public and which were sold by their owner, (that owner merely reserving, and as trustee, the fee,) are still in the same category and class that they were originally in, namely, "public lands." The very character and nature of the lands have been changed by the grant, and what was public has become private, and this as between the grantor and the grantee.

Appellant says: "It is therefore apparent that the law is, and, while there appears to be no express ruling on the subject, has been carefully, by implication, held to be, that as between the claimant and the Government, the lands remain public lands of the United States until the issuance of patent. This must surely be so, for, under the general land and mineral laws of the United States, it is absolutely impossible for the Government to convey anything but its public lands."

We believe appellant to be quite correct in saying that there has been no ruling or decision that mining claims remain public lands of the United States until the issuance of patent. We likewise, know of no such decision. Nor do

we know of any case that by implication, however remote, holds that a mineral claim properly located is still public land of the United States. The fact that the fee remains in the Government is of no importance. Take a homestead entry which has been completed and finally proved up upon, and final receipt issued. In this instance the fee is still in the Government, but would it be urged for a moment that the lands were still public lands? Is it not true that there are many, many decisions, and of the highest courts, that hold just the contrary, and declare that when the homestead entryman has obtained his final receipt that he is the owner of the land, and may do what he pleases with it, and that the Government merely holds the fee in trust, to be conveyed to him as soon as may reasonably be done? It is, of course, true that the United States may only convey public lands, but the question is, *when* does it convey the lands? In the case of a mining claim it conveys the lands when the location is made, merely reserving the naked fee as trustee, and this to be conveyed without choice or discretion, when the statutory requirements are complied with.

Appellant again states that the land within an unpatented mining claim is still public land,—must be,—otherwise the Government would have no authority to order as a condition precedent to title, that a survey be made of the ground. The fact that the Government makes it a condition, precedent to the granting of the fee which it holds in trust, that a survey be made, can have, it seems to us, nothing whatever to do with the question whether the land is public or private. The character of the land as to public or private, has been fixed and determined by the original grant made by the locator long before the question as to the official survey could arise. One of the conditions of the granting of the fee held in trust, is that a survey be made, and that is all.

The judgment of the lower court is correct, and should be affirmed.

Respectfully submitted,

S. L. KINGAN,
Attorney for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY HENN in Behalf of MABEL HENN, a Minor,
Appellant,

vs.

CHILDREN'S AGENCY (a Corporation), and KATH-
ERINE FELTON, President or Manager Thereof,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY HENN in Behalf of MABEL HENN, a Minor,
Appellant,

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ERINE FELTON, President or Manager Thereof,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

No. 15,278.

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Names and Addresses of Attorneys.

For Petitioner and Appellant: HENRY B. LISTER,
Esquire, San Francisco, California.

For Respondent and Appellee: W. T. KEARNEY,
Esquire, San Francisco, California.

*In the District Court of the United States for the
Northern District of California, First Division.*

No. 15,278.

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Praecipe for Record on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare certified copies of the following
papers on file in your office in the above-entitled pro-
ceeding:

Petition for writ of habeas corpus, amended peti-
tion for writ of habeas corpus, demurrer to petition,
order to show cause, opinion sustaining demurrer to
petition for writ, petition for appeal, notice of ap-
peal, order granting appeal, assignment of errors,

citation, all minute orders other than those continuing matters, praecipe.

Respectfully,

HENRY B. LISTER,

Attorney for Petitioner.

[Endorsed]: Filed Sep. 6, 1912. Jas. P. Brown,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Petition for Writ of Habeas Corpus.

To the Honorable Judges of the United States District Court for the Northern District of California:

The petition of Mary Henn respectfully shows that Mabel Henn is unlawfully imprisoned, detained, confined and restrained of her liberty by the Children's Agency, a corporation doing business in the City and County of San Francisco, State of California, and by Katherine Felton, the president or manager of said corporation.

That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit: That your petitioner is and at all times mentioned herein was a resident of the State of Montana. That Mabel Henn is the minor daughter of your petitioner, being about ten

*Page-number appearing at foot of page of original certified Record.

years old. That said Mabel Henn was born to your petitioner in lawful wedlock in the State of Montana, the father also being at all times since her birth until his death a resident of the State of Montana.

That said Mabel Henn has never been emancipated by your petitioner or by any court of competent jurisdiction. Neither has said minor ever been abandoned by your petitioner.

That on or about the 27th day of May, 1910, the said Mabel Henn was taken on a visit to California by Marie Maginnis for her health, as she had been sick with typhoid fever, and such a change was necessary. That said Mabel Henn was only taken to California for the purpose of said [2] visit and on the agreement that she was to be returned to Montana within six months.

That for nearly two years your petitioner was unable to locate said Mabel Henn until she was recently informed of her whereabouts by said Marie Maginnis.

That the said Children's Agency and said Katherine Felton claim the custody of said minor through and by virtue of a decree of the Juvenile Court of the City and County of San Francisco, State of California, by which judgment it is claimed that said Mabel Henn has been emancipated from your petitioner and her care and custody given until her majority to said Children's Agency. That said minor has not been charged or convicted of any crime, and has never and is not subject to the probate jurisdiction of the State of California.

That the Act to wit: Act No. 1770, Statute 1911, pp. 63, 658 of the laws of the State of California is

unconstitutional by reason of the fact that more than two subjects are embraced in its title, and also that it violates Article XIII (13) of the Amendment to the United States Constitution by authorizing the enslaving of a minor whether they are competent to take care of themselves or not.

And also that it violates Article XIV (14) of the United States Constitution in that your petitioner has been and still is deprived of the care and custody of her minor child without any process being served on her. Also that said minor has been deprived of her liberty and the care and protection of a parent without due process of law.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be granted directing the said Katherine Felton and the said Children's Agency, Incorporated, commanding her and it to have the body of said Mabel Henn before this Honorable [3] Court at a time and place therein to be specified to do and receive what shall then and there be considered by your Honors concerning her, together with the time and cause of her detention, and said writ: and that she may be restored to her liberty.

Dated June 13th, 1912.

MARY HENN,
Petitioner.

HENRY B. LISTER,
Attorney for Petitioner.

State of Montana,
County of Flathead,—ss.

Mary Henn, being first duly sworn, deposes and says: That she is the petitioner named in the above-

entitled action; that she has heard read the foregoing, her petition, and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated on her belief and as to those matters that she believes to be true.

[Seal]

MARY HENN.

Subscribed and sworn to before me this 13th day of June, 1912.

GEORGE F. STANNARD,

Notary Public for the State of Montana, Residing at
Kalispell, Montana.

My commission expires July 14, 1912.

[Endorsed]: Filed Jun. 19, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [4]

*In the District Court of the United States, for the
Northern District of California, First Division.*

In the Matter of the Application of MARY HENN,
for a Writ of Habeas Corpus of MABEL
HENN.

Order to Show Cause.

ORDERED that Katherine Felton and the Children's Agency, a corporation, show cause before this Court on Tuesday, June 25th, 1912, at 10 o'clock in the forenoon of that day, why the Writ of Habeas Corpus should not be issued as prayed for in said petition.

FURTHER ORDERED that a copy of this order and the petition herein be served upon said Katherine

Felton and the Children's Agency on or before **June 22d, 1912.**

Dated: June 20th, 1912.

JOHN J. De HAVEN,
Judge.

[Endorsed]: Filed Jun. 20, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [5]

*In the District Court of the United States for the
Northern District of California, First Division.*

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Demurrer to Petition for Writ of Habeas Corpus.

Comes Katherine Felton, and the Children's Agency, a corporation, and demur to the petition of Mary Henn, praying for a writ of Habeas Corpus herein, on the following grounds to wit:

I.

That the Court has no jurisdiction of the person of Mabel Henn.

II.

That the Court has no jurisdiction of the subject of this action.

III.

That Mary Henn has no legal capacity to sue in this proceeding.

IV.

That there is another action pending between the same parties for the same cause.

V.

That the petition does not state facts sufficient to constitute a cause of action.

Wherefore said respondents pray that said petition be denied.

W. T. KEARNEY,
Attorney for Respondents.

W. T. Kearney, one of the attorneys for the said respondents, [6] hereby certifies that in his opinion, said demurrer is good in point of law, and is not taken to delay these proceedings.

W. T. KEARNEY.

[Endorsed]: Filed Jun. 25, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [7]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 26th day of June, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. De HAVEN, Judge.

15,278.

In re Petition of MARY HENN for a Writ of Habeas Corpus.

Order Submitting Petition.

This matter this day came on for hearing on the return to the Order to Show Cause issued herein, and after hearing counsel for the respective parties, by the Court Ordered that said matter be, and the same

is hereby submitted to the Court for determination.
[8]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 27th day of June, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. De HAVEN, Judge.

15,278.

In re Petition of MAY HENN, for a Writ of Habeas Corpus for MABEL HENN.

Order Sustaining Demurrer and Denying Petition.

This matter having been heretofore submitted to the Court for determination, now after due consideration had, the Court files its written opinion, and by the Court Ordered that the Demurrer to the Petition for a Writ of Habeas Corpus, be, and the same is hereby sustained; Further Ordered, that said Petition be, and the same is hereby, denied. [9]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,278.

In the Matter of the Application of MARY HENN for a Writ of Habeas Corpus in Behalf of MABEL HENN.

Opinion Sustaining Demurrer to Writ, etc.

De HAVEN, District Judge.—The petitioner alleges that Mabel Henn, age ten, is her minor daughter; that petitioner was at all the times mentioned in the petition and now is a resident of the State of Montana; that on or about the 27th day of May, 1910, the said Mabel Henn was taken from said State on a visit to California by one Marie Maginnis, for her health, and under an agreement that the child was to be returned to Montana within six months; that for nearly two years the petitioner was unable to locate said minor, and was only recently informed of her whereabouts. It is further alleged that the Children's Agency claims the right to the custody of said minor by virtue of a decree of the Juvenile Court for the City and County of San Francisco, State of California.

It is not claimed that there was any failure to take the steps required by the laws of the State of California in order to give that Court jurisdiction to render the judgment referred to; it must therefore be assumed that the procedure leading up to such judgment was in conformity with the requirements of such laws; but the petition alleges in substance that the statute of the State of California establishing said Juvenile Court "is unconstitutional by reason of the fact that more than two subjects are embraced in its title," and also because it violates the thirteenth amendment to the United States Constitution in that it authorizes the enslaving of a minor whether competent to take care of itself or not, and further that

it violates the fourteenth amendment to the Constitution [10] "in that your petitioner has been and still is deprived of the care and custody of her minor child without any process being served on her. Also that said minor has been deprived of her liberty and the care and protection of a parent without due process of law."

In my opinion, neither of these objections to the statute can be sustained.

The Demurrer to the petition is sustained and the application for a Writ of Habeas Corpus is denied.

[Endorsed]: Filed Jun. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [11]

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Amended Petition for Writ of Habeas Corpus.

To the Honorable Judges of the United States District Court of the Northern District of California:

The amended petition of Mary Henn respectfully shows that Mabel Henn is unlawfully imprisoned, detained, confined and restrained of her liberty by the Children's Agency, a corporation doing business in the City and County of San Francisco, State of California, and by Katherine Felton, the president or manager of said corporation.

That said imprisonment, detention, confinement and

restraint are illegal, and that the illegality thereof consists in this, to wit: That said Mabel Henn now is and at all times since her birth has been a citizen and resident of the State of Montana. That said Mabel Henn does not now have and never has had any residence in the State of California. That your petitioner is now and at all times mentioned herein has been a citizen and resident of the State of Montana. That the said Mabel Henn is the lawful daughter of your petitioner. That her father is dead. That said Mabel Henn is a minor child about ten years of age, who is legally subject to the dominion of your petitioner, and who has never been emancipated from your petitioner. That said minor child is a ward of the State of Montana, and is subject to the dominion of your [12] petitioner under and by the virtue of the laws of the State of Montana.

That on or about the 27th day of May, 1910, said Mabel Henn was temporarily within the territory of the State of California, to wit, in the City and County of San Francisco.

That at or about said time said Mabel Henn was seized, under and by virtue of the process of the Superior Court of the State of California, in and for the City and County of San Francisco, and was charged with being a dependent child; under Subdivision 13, Sec. 1, Act 1770, as amended in 1911. Statutes of 1911, State of California, pp. 63, 658.

That no guardian *ad litem* was appointed for said minor child. That no process was served on your petitioner either in person or by substitution.

That said minor child was not charged with the

commission of any crime.

That under the provisions of section 3 of said act a petition was filed charging said minor with being within the county and being dependent, by reason of her father's death, and having no proper home.

That said minor was thereupon convicted of being an orphan within the county without having a proper home.

And was committed to the Children's Agency until her majority, to wit, until she shall have reached the age of twenty-one years.

That the said conviction of said minor, and the said delivery of her body with her services to said corporation for the period of eleven years, without any provisions for her release is slavery.

That section 3 of said Juvenile Court Act confers [13] jurisdiction on a State to enslave foreign minors without conviction for crime, and thereby violates the XIV Amendment to the United States Constitution.

That said section abridges the right of foreign minors to return to their own native states, and authorizes the imprisonment of them within the State without conviction of crime.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted directing the said Katherine Felton and the said Children's Agency, Incorporated, commanding her and it to have the body of said Mabel Henn before this Honorable Court at a time and place therein to be specified to do and receive what shall then and there be considered by your Honors concerning her, together with the time and

cause of her detention, and said writ; and that she may be restored to her liberty.

Dated this 28th day of June, 1912.

MARY HENN,
Petitioner.

By HENRY B. LISTER,
Her Attorney.

State of California,
City and County of San Francisco,—ss.

Henry B. Lister, being first duly sworn, deposes and says: that he is the attorney for Mary Henn, the petitioner. That said petitioner is in the State of Montana, and therefore said petition is verified by affiant.

That affiant has read the foregoing petition and knows the contents thereof, that the same is true of his own knowledge except as to matters therein stated on ~~his own~~ information and belief, and as to those matters he believes it to be true.

That affiant's knowledge as ~~believes it to be true~~ to the matters occurring in Montana is based on correspondence of said Mary Henn.

HENRY B. LISTER. - [14]

Subscribed and sworn to before me this 28th day of June, A. D. 1912.

[Seal] L. H. ANDERSON,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within is hereby acknowledged this 28th—8th day of *July (June)*, 1912.

W. T. KEARNEY,
Attorney for Children's Agency.

[Endorsed]: Filed Jun. 28, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [15]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 2d day of August, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. De HAVEN, Judge.

15,278.

In re Petition for Writ of Habeas Corpus on Behalf of MABEL HENN.

Order Denying Amended Petition for Writ.

On motion of Henry B. Lister, Esqr., the Amended Petition for a Writ of Habeas Corpus filed herein was submitted to the Court for determination, and thereupon after due consideration had thereon, by the Court, Ordered, that said Petition be, and the same is, hereby denied. [16]

In the District Court of the United States for the Northern District of California, First Division.

In the Matter of the Application of MARY HENN for a Writ of Habeas Corpus of MABEL HENN.

Petition for an Appeal.

Now comes the petitioner herein, and says: That on the 27th day of June, 1912, the demurrer of the respondents to petitioner's petition was sustained and

an order made denying petitioner's petition; that on the 29th day of June, 1912, the petitioner, herein, filed an amended petition for Writ of Habeas Corpus, and that on the 2d day of August, 1912, the said amended petition was denied, in which said orders and judgment certain errors were made to the prejudice of the petitioner, all of which will appear here in detail from the assignment of errors, filed herein.

Wherefore, this petitioner prays that an appeal may be granted in her behalf to the Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and further that the transcript of the record, proceedings, and papers in the above-entitled matter, duly authenticated, may be sent, herein, to said Circuit Court of Appeals.

Dated this 26th day of August, 1912.

HENRY B. LISTER,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Aug. 26, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [17]

*In the United States District Court, Northern Dis-
trict of California, First Division.*

No. 15,278.

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus for MABEL
HENN.

Notice of Appeal.

The respondents, Catherine Felton and the Children's Agency, a corporation, and their attorney, William T. Kearney, will please take notice that the

petitioner in said cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order sustaining respondent's demurrer to petition herein, and denying the said writ, made by the above-named District Court on the 27th day of June, 1912, and also from the order denying the amended petition for Writ of Habeas Corpus made by the above-named District Court on the 2d day of August, 1912, and from each part of said orders, and from the whole thereof.

Dated this 3d day of August, 1912.

HENRY B. LISTER,

Solicitor and of Counsel for Petitioner.

Received copy of the within notice of appeal, this 9th day of August, 1912, reserving all rights and objections.

W. T. KEARNEY.

By T. E. HAYD,

Attorney for Respondents.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [18]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,278.

In the Matter of the Application of MARY HENN
for a Writ of Habeas Corpus of MABEL
HENN.

Order Allowing Appeal.

Upon reading and filing the petition for an appeal in the above-entitled action, together with the assign-

ments of error, the Court being fully advised in the premises,

Now, therefore, it is hereby ordered that said appeal be granted, and a bond therefor, in the sum of \$100.00, shall be filed by appellant for damages and costs and that the record be transcribed and filed in the said United States Circuit Court for the Ninth Circuit, under said appeal as prayed and granted.

Dated this 26th day of August, 1912.

JOHN J. De HAVEN,

Judge of the United States District Court of the Ninth District of California, First Division.

[Endorsed]: Filed Aug. 26, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [19]

In the United States District Court, Northern District of California, First Division.

No. 15,278.

In the Matter of the Application of MARY HENN
for Writ of Habeas Corpus for MABEL
HENN.

Assignment of Errors.

The petitioner and appellant, in the above-entitled cause and proceeding, specifies the following as the errors committed by the District Court of the United States, in and for the Northern District of California, First Division, in its decision and orders in said cause, and also in the proceedings therein:

1. The said Court erred in sustaining the demurrer of respondents to petitioner's petition, and in denying said petition.

2. The said Court erred in denying the amended petition for Writ of Habeas Corpus.

In order that the foregoing assignment of error may be an appeal of record, petitioner and appellant herein files and presents the same to the Court, and prays that such disposition be made thereof as in accordance with the law in such cases made and provided, and said claimant and appellant prays a reversal of the orders, made and entered herein, and for judgment that the Writ of Habeas Corpus be issued, as prayed.

Dated, San Francisco, August 3d, 1912.

HENRY B. LISTER,

Solicitor and of Counsel for Petitioner.

Copy received this 9th day of August, 1912.

W. T. KEARNEY.

By T. E. HAYD,

Attorney for Respondents.

[Endorsed]: Filed Aug. 9, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [20]

Citation (Original).

UNITED STATES OF AMERICA,—ss:

The President of the United States, to Children's Agency (a Corporation), Catherine Felton, and William T. Kearney, Esq., Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty

days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court, 1st Division, for the Northern District of California, wherein Mary Henn was appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN J. De HAVEN, United States District Judge for the Northern District of California, this 5th day of September, A. D. 1912.

JOHN J. De HAVEN,
United States District Judge.

Receipt of a copy of the within Citation on Appeal on the respondents is hereby admitted to have been made this 5th day of September, 1912.

W. T. KEARNEY,
Attorney for Respondents.

[Endorsed]: No. 15,278. U. S. Circuit Court of Appeals for the Ninth Circuit. Mary Henn, Appellant, vs. Children's Agency and Catherine Felton, Appellees. Citation on Appeal. Filed Sep. 6. 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

Citation (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Children's Agency (a Corporation), Catherine Felton, and William T. Kearney, Esq., Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court, 1st Division, for the Northern District of California, wherein Mary Henn was appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. De HAVEN, United States District Judge for the Northern District of California, this 5th day of September, A. D. 1912.

JOHN J. De HAVEN,
United States District Judge.

Receipt of a copy of the within Citation on Appeal on the respondents, is hereby admitted to have been made this 5th day of September, 1912.

W. T. KEARNEY,
Attorney for Respondent.

[Endorsed]: Filed Sep. 6, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Henry B. Lister, as principal and National Surety Co., a corporation of New York, as sureties, are held and firmly bound unto the Children's Agency and Catherine Felton, in the full and just sum of One Hundred Dollars to be paid to the said Children's Agency and Catherine Felton, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of August, in the year of our Lord one thousand nine hundred and twelve.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said court, between Mary Henn, petitioner, for a Writ of Habeas Corpus of the person of Mabel Henn and in which the Children's Agency (a corporation), and Catherine Felton, were respondent, an order was rendered against the said Mary Henn denying to issue a writ, and the said Mary Henn, having obtained from said court an Order allowing her appeal to reverse the order in the aforesaid suit, and a citation directed to the said Children's Agency and Catherine Felton, citing and admonishing them to be and appear at a United States Circuit Court of Appeals, for the Ninth Cir-

cuit, to be holden at San Francisco, in the State of California—

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Mary Henn shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY B. LISTER. [Seal] [23]
NATIONAL SURETY COMPANY, [Seal]
By FRANK L. GILBERT,

Attorney in Fact.

Acknowledged before me the day and year first above written.

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Form on Bond and sufficiency of sureties approved.

JOHN J. De HAVEN,
Judge.

[Endorsed]: Filed Sep. 5, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [24]

Certificate of Clerk District Court to Transcript.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereto attached twenty-four pages, numbered from 1 to 24, inclusive, constitute a full, true and correct transcript of the records, as the same now appear on file and of record in this office in the matter of the application of Mary Henn for a Writ of Habeas Corpus of Mabel Henn,

numbered 15,278. That said Transcript is made up pursuant to the "Praecipe for Record on Appeal," embodied in said transcript and the instructions of Henry B. Lister, Esquire, attorney for the appellant herein.

I further certify that the costs of preparing and certifying the foregoing Transcript is the sum of Ten Dollars and Ninety Cents (\$10.90), and that the same has been paid to me by the attorney for appellant herein.

In Witness Whereof, I have hereunto set my hand and official seal of said District Court, this 4th day of October, A. D. 1912.

[Seal]

JAS. P. BROWN,
Clerk.

By Francis Krull,
Deputy Clerk. [25]

[Endorsed]: No. 2188. United States Circuit Court of Appeals for the Ninth Circuit. Mary Henn in Behalf of Mabel Henn, a Minor, Appellant, vs. Children's Agency (a Corporation), and Katherine Felton, President or Manager Thereof, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed October 4, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY HENN in Behalf of MABEL
HENN, a Minor,

Appellant,

vs.

CHILDREN'S AGENCY (a Corpor-
ation), and KATHERINE FEL-
TON, President or Manager There-
of,

Appellees.

No. 2188

Brief of Appellant

HENRY B. LISTER,

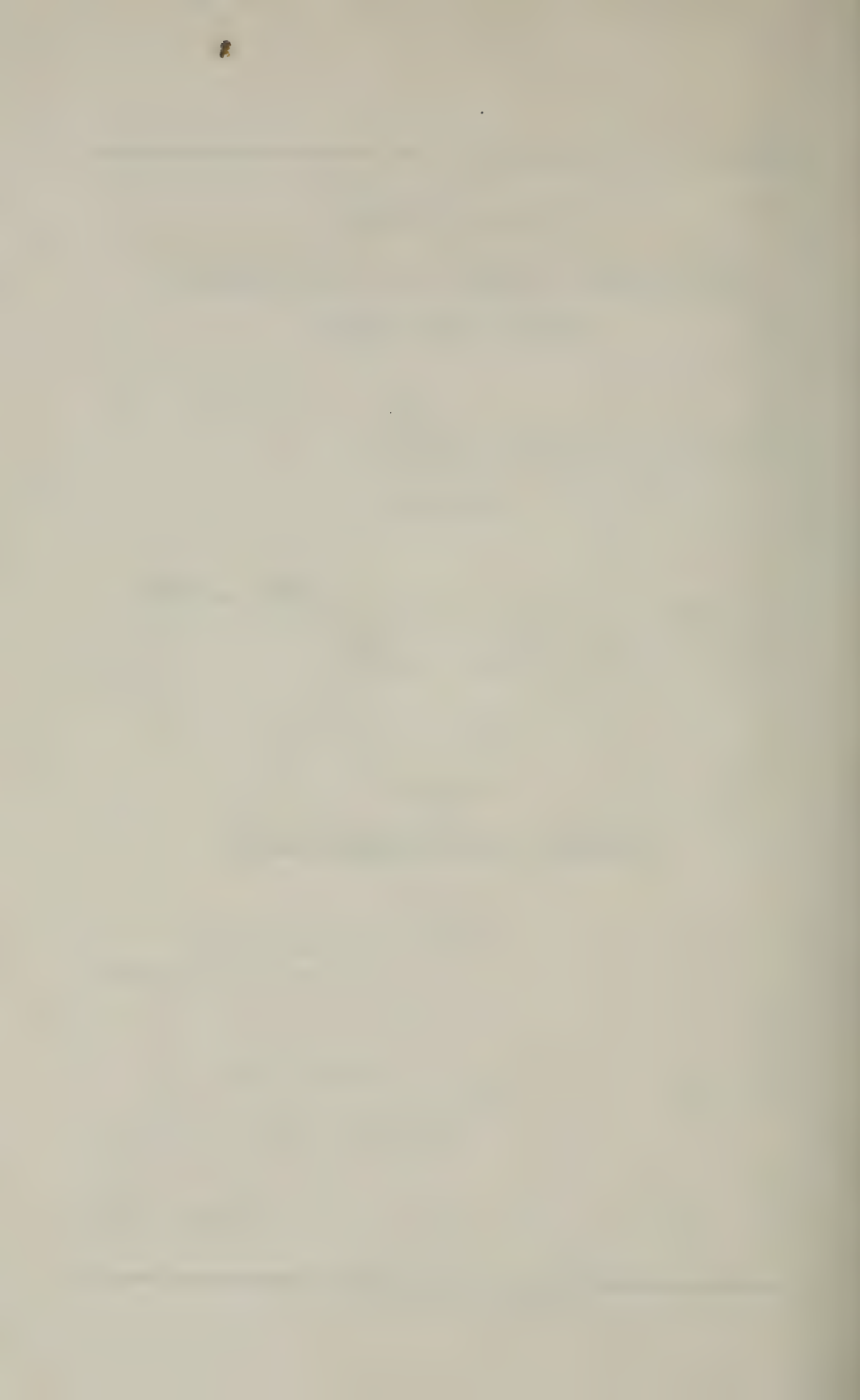
Attorney for Appellant.

Filed this.....day of October, 1912.

FRANK D. MONCKTON,

Clerk.

By.....Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY HENN in Behalf of MABEL
HENN, a Minor,

Appellant,

vs.

CHILDREN'S AGENCY (a Corpor-
ation), and KATHERINE FEL-
TON, President or Manager There-
of,

Appellees.

No. 2188

BRIEF OF APPELLANT

The only point to be determined by this appeal is the jurisdiction of the Juvenile Court of the State of California, to substitute a corporation as parent for a foreign infant, temporarily within the State. The Juvenile Court Act of California is evidently based upon the theory that the State is the common parent of all its citizens, but even if such an assumption of parentage is constitutional in regard to its own citizens, the same logic does not apply in the case of foreign infants, temporarily within the State. Counsel can find no case directly bearing on this point, because so far as his researches go, he has been unable to find any other instance in which a State or Nation, either ancient or modern, has ever claimed any such right.

“An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own, and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infant, the domicile of the children in either case follows the independent domicile of the parent.”

Lamer vs. Macon, 112 U. S. 452.

In probate and guardianship affairs over a foreign infant, the State acts through comity only, and it is not comity, but usurpation, to refuse a foreign infant the right to return to the State of its domicile. A State may exclude a foreign infant unless accompanied by its parent or proper guardian, but it has no right to adopt a foreign infant and turn it over to a charitable institution against the wishes and without the consent of its natural guardian. It has no right to refuse to deliver it up to its parent or permit it to return to its own State.

Respectfully submitted,

HENRY B. LISTER,
Attorney for Appellant.

No. 2188

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY HENN in behalf of Mabel Henn, a
minor,

Appellant,

vs.

CHILDREN'S AGENCY (a corporation),
and KATHERINE FELTON, president
or manager thereof,

Appellees.

BRIEF OF APPELLEES.

The matter of the custody of the minor, herein-
above referred to as Mabel Henn, has been finally
determined by a judgment of the Supreme Court of
the State of California, and each and all of the ob-
jections urged in this proceeding by the petitioner,
were fully and squarely decided by that court ad-
versely to her contention. The case is reported
under the title of "*Ex parte Maginnis*," 121 Pacific
Rep., p. 723.

A judgment of the Supreme Court of the State of California, involving a matter confessedly within its jurisdiction will not be disregarded by this court.

Erickson v. Hodges, 179 Fed. 177;

Kroschel v. Munkers, 179 id. 961;

Howard v. Fleming, 196 U. S. 126;

Ex parte Le Bur, 49 Cal. 159.

The federal courts have no jurisdiction to issue a writ of habeas corpus, in such a case as the one at bar; the matter in dispute (the custody of a minor child) being incapable of being reduced to any pecuniary standard of value. The following federal cases among many, fully cover that point.

In re Huse, 25 C. C. A. 4 (note 25);

Ex parte Everts, Federal Cas. 4581;

Perrine v. Slack, 164 U. S. 452;

In re Barry, 42 Fed. 113; 2 How. 65; also same case, 5 How. 103;

Ex parte Burris, 136 U. S. 586.

The only point urged in the brief of appellant is fully answered by the fact that the physical presence of the minor within the State gave jurisdiction to the State courts to determine her status and adjudge as to her custody. The trial court found the minor to be an abandoned child and a resident of the State of California. The statement of petitioner that she was "unable to locate" said minor for nearly two years is significant in this connection.

"Every sovereignty exercises the right of determining the status and condition of persons

found within its jurisdiction and the law of a foreign state cannot be permitted to intervene to affect the person's rights or privileges, even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government."

Woodworth v. Spring, 4 Allen (Mass.) 321,
cited with approval in

De La Montanya v. De La Montanya, 112
Cal. p. 117.

Respectfully submitted,

W. T. KEARNEY,
Attorney for Appellees.

No. 2188

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY HENN, in behalf of Mabel Henn
(a minor),

Appellant,

vs.

CHILDREN'S AGENCY (a corporation),
and KATHERINE FELTON, president
or manager thereof,

Appellees.

APPELLANT'S REPLY BRIEF.

The act of Congress of February 5, 1867, extended the writ of habeas corpus "to all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States", and made the writ issuable by the several courts of the United States and the several justices and judges of said courts within their respective jurisdictions. This act was incorporated in Section 753, revised statutes of the United States.

“Where an imprisonment results from a statute which violates a right guaranteed by the Federal Constitution a writ of habeas corpus will issue from the Federal Courts.”

Ex parte James H. Savage, 134 U. S. 176.

Jurisdiction of the federal courts is claimed by the petitioner, not because of diverse citizenship, which requires a pecuniary value of \$3000, but because it is claimed that Mabel Henn, a foreign minor, is restrained from returning to the State of Montana, which appears upon the face of the record to be her residence. The question is exactly the same as the recent dispute between the United States and Russia in regard to the right of citizens of the United States of Jewish race to enter and leave Russia. Russia also claimed the right of guardianship over the children of citizens of the United States of the Jewish race who entered Russia, and refused the right of said children to leave again. For this breach of international law, the United States revoked its treaty with Russia.

In the case at bar, a parent permitted a minor child to come to California for its health. The custodian, Marie Maginnis, was charged with failure to provide this child with a proper home in the State of California. It is not contended that during the time that this minor wished to reside in California that the State exceeded its jurisdiction in seeing that she was properly provided with a home, but it is contended that as soon as the

mother, the natural guardian of this child, demanded her return to the State of Montana any jurisdiction of the State of California to retain the child thereupon ceased.

A prison may be anything which restrains a person of personal liberty. A prison may be a cell, six feet by four feet, or it may be a whole state. It is contended that a statute which confers upon a court the right to confiscate all foreign persons under twenty-one years of age and prevent them from leaving the state is in direct violation of the United States Constitution and, as such, to fall within the jurisdiction of the federal courts.

Although the court found Mabel Henn to be a resident of the State of California, it conclusively appears from the face of the record that she could not be a resident of the State of California. The original complaint, charging her with being a dependent child under the statute, sets forth facts which establish conclusively that she was not a resident of the State of California, and a finding to the contrary does not, and cannot, cure this defect upon the face of the record. The case of *De La Montanya v. De La Montanya* held that where a father had removed his children, who were legal residents of California, to France and both he and the children were in France, the wife could not, by publication of summons against the absent husband, get a decree awarding her the custody of the children. The case of *De La Montanya v. De La Montanya*, if it stands for anything, deter-

mines the fact that this petitioner could not get a valid decree in the State of Montana against the respondents in the case of this minor by substituted service of summons to compel them to return the child to Montana. Mrs. De La Montanya got a decree from the Superior Court of California against her absent husband ordering him to bring the children back from France into California and with a view to having the French government enforce this order through comity. The court held that such a decree was void.

The sole question to be determined by this appeal is whether or not a state can obtain jurisdiction over a foreign minor to imprison the minor until his or her majority either in an institution or by delivering the minor over to any other person or corporation that it sees fit and thereby preventing the said foreign minor from leaving the state. Does the mere fact that a foreign minor comes physically within the territory of a state, entitle the state to the right of determining that he must continue to reside in the state until his or her majority?

Under this law, a foreign minor, in transit on a railway train through the state, may be seized and held in prison for smoking a cigarette, not as a punishment for crime; for smoking cigarettes is not made a crime, but because the law of California has decided that all minors who smoke cigarettes may be imprisoned until their majority.

It is respectfully submitted that the forcible retaining of this minor child within the State of California, against the wishes of its mother and guardian, is a direct violation of the Constitution of the United States.

Respectfully submitted,

HENRY B. LISTER,
Attorney for Appellant.

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